# THE EU EXTERNAL ACTION AS MANDATE TO UPHOLD THE RULE OF LAW OUTSIDE *AND* INSIDE THE UNION

*Christophe Hillion*[*]



* Centre for European Law, University of Oslo. This article was written in the context of a research event hosted by the Institute for European Law of KU Leuven and the RESHUFFLE project (European Union's Horizon 2020 research and innovation programme, grant agreement No 851621), and in the framework of the ENROL project (ENforcing the Rule Of Law in the EU, funded by the Norwegian Research Council, 325707). I am grateful to Anne Myrjord and Niamh Nic Shuibhne for all their helpful comments, to the participants of the Jubilee Conference of the Leuven Institute for European Law, to my ENROL colleagues, and those at the Centre for European Law in Oslo, for the discussions and feedback on earlier presentations of the paper. Special thanks to Elise Muir for her immeasurable patience, and constant encouragements throughout the (long) writing process. All mistakes are mine.

## 1. INTRODUCTION

The European Union has been entrusted by its Member States to uphold the rule of law not only internally,[1] but also in its interactions with the wider world. In the latter context specifically, the EU Treaties envisage the observance of the rule of law both as a *central objective* of the Union's external action (2), and as a *structural principle* governing the way in which this action is conducted (3).[2]

This paper discusses these two distinct yet interconnected functions in turn, in an attempt to assess to what extent the EU may be trusted as a guardian of the rule of law, notably by the outside world. It does so by examining the particulars of what will be referred to as the Treaty-based *EU external rule of law mandate*, some of the legal tools to carry it out, and those that may be mobilized to enforce it.

Based on that analysis, the paper suggests that for the EU to fulfil its mandate and be credible as guardian of the rule of law, it must not only promote and uphold it coherently in all its external policies. It must also, if not primarily, observe it (and be seen to observe it) in the way in which it operates, both in its institutional framework and in (all) its Member States, and be held accountable in case of failure. As the Union often requires from its partners that they respect the rule of law as a precondition for establishing, maintaining, and deepening their cooperation, they in turn may expect that the EU consistently adhere to it too. This requires that the Union meet its own commitments towards them by securing commensurate observance of the rule of law within its own composite system.

External scrutiny of the EU's performance in this respect has indeed grown, particularly in view of the deterioration of the rule of law in several of its Member States.[3] Whether and how the Union's institutions (and other Member States) react to this deterioration will determine how much authority it yields as guardian of the rule of law in general,[4] and in relation to the wider world in particular. Should it fail to reverse those internal regressions, the Union not only risks further losing its credibility

---

[1] See other contributions to this Special Issue.

[2] On the notion of structural principles, see M. Cremona (ed.), *Structural Principles in EU External Relations Law* (2018), and on the rule of law as structural principle, see chapter 9 by I. Vianello, "the Rule of Law as a Relational Principle Structuring the Union's Action Towards its External Partners".

[3] Vidar Helgesen, "Hungary's journey back into the past", *Financial Times*, 28 August 2014, available at <https://www.ft.com/content/2234f99a-2942-11e4-8b81-00144feabdc0> ; "Poland angers US by rushing through media law amid concerns over press freedom", *The Guardian*, 18 Dec. 2021 <https://www.theguardian.com/world/2021/dec/18/poland-angers-us-by-rushing-through-media-law-amid-concerns-over-press-freedom >.

[4] See e.g. Rostane Mehdi, "Heurs et malheurs de l'Etat de droit, l'Union au défi d'une crise essentielle" (Hart, 2022) 657 *Revue de l'Union européenne*, p. 240; Tomasz Tadeusz Koncewicz, *L'Etat de Droit supranational comme premier principe de l'espace public européen – Une union toujours plus étroite entre les peoples d'Europe mise à l'épreuve?* (Fondation Jean Monnet pour l'Europe, Collection débats et documents. No 22, octobre 2021); Wojciech Sadurski, *Poland's constitutional breakdown* (OUP, 2019); Antonina Bakardjieva Engelbrekt, Andreas Moberg, Joakim Nergelius (eds), *Rule of Law in the EU: 30 Years After the Fall of the Berlin Wall* (Hart, 2021); Werner Schroeder, "The European Union and the Rule of Law – State of Affairs and Ways of Strengthening" in Werner Schroeder (ed.) *Strengthening the rule of law in Europe* (Hart, 2019), p. 3; Laurent Pech & Kim Scheppele, "Illiberalism Within: Rule of Law Backsliding in the EU", (2017) 19 *CYELS* p. 3.

as promoter of the rule of law, and as a force for good.[5] But more practically, it will be unable to meet its international obligations,[6] thereby weakening the "rules-based international order" it otherwise advocates,[7] and on which its influence rests. It might ultimately devalue the very significance of the principles it seeks to advance in its relations with the wider world, and on which it is otherwise founded, precisely at a time they are being attacked in Europe,[8] and globally.[9]

In sum, securing the Member States' consistent compliance with the rule of law is as existential to the Union' external action, as it is to the functioning of the EU single market or the area of freedom security and justice. In turn, the EU external action bolsters the normative basis for the Union actively to enforce the rule of law within its midst.

## 2. THE RULE OF LAW AS CENTRAL OBJECTIVE OF THE EU EXTERNAL ACTION

EU primary law establishes an elaborate mandate for the Union to uphold and promote the rule of law in, and through its external action (2.1). EU institutions have carried it out through a variety of tools, whose piecemeal deployment raises a question of consistency between expectations and delivery (2.2).

### *2.1. Constitutional mandate*

Article 3(5) TEU foresees that in its relations with the wider world, the EU "shall uphold and promote its values" which, according to Article 2 TEU, includes the rule of law. This prescription constitutes a specific (external) expression of the EU's general mandate to promote its values that is set out in paragraph 1 of the same Article ("The Union's aim is to promote … its values"), and which is further reiterated in Article 13(1) TEU (EU institutions "shall aim to promote [the Union's] values").[10] Located in the general provisions of the TEU that govern the Union's external action,

[5] On this point, see also e.g. Yuliya Kaspiarovich and Ramses A Wessel, "The Role of Values in EU External Relations: A Legal Assessment of the EU as a Good Global Actor", in Elaine Fahey and Isabella Mancini (Eds.), *Understanding the EU as a Good Global Actor: Ambitions, Values and Metrics* (Routledge 2022), p. 92-106

[6] See in this sense, Case C-66/18, *Commission v Hungary (Lex CEU),* EU:C:2020:792.

[7] See EEAS, *A strategic compass for Security and Defence* (2022) < https://www.eeas.europa.eu/eeas/strategic-compass-security-and-defence-0_en> which mentions that objective several times. See also: European Commission, *Trade Policy Review - An Open, Sustainable and Assertive Trade Policy*, COM (2021) 66 final, p. 4.

[8] Ewa Łętowska, "La guerre en Ukraine et l'Etat de droit" (2022) 657 *Revue de l'Union européenne*, p. 263.

[9] "States Must Uphold Rule of Law, Fundamental Freedoms When Responding to Global Emergencies, Speakers Stress, as Sixth Committee Continues Debate on Principle", <https://reliefweb.int/report/world/states-must-uphold-rule-law-fundamental-freedoms-when-responding-global-emergencies-speakers-stress-sixth-committee-continues-debate-principle>; "The global assault on rule of law", <https://www.ibanet.org/The-global-assault-on-rule-of-law > ; "The Global Rule of Law Recession Continues", <https://worldjusticeproject.org/rule-of-law-index/ >.

[10] On the EU mandate to promote the rule of law, see e.g. Christophe Hillion, "Overseeing the rule of law in the European Union Legal mandate and means", in Carlos Closa and Dimitry Kochenov (eds), *Reinforcing Rule of Law Oversight in the European Union* (CUP, 2016), pp. 59-81.

Article 21(1) TEU further stipulates that this action "*shall be guided by the principles which have inspired [the EU's] own creation, development and enlargemen*t, *and which it seeks to advance in the wider world* [including]: democracy, *the rule of law,* the universality and indivisibility of human rights and fundamental freedoms, … and respect for the principles of the United Nations Charter and international law" (emphases added).

An umbilical connection is thereby established, and a normative continuum required, between the Union's own foundations and those of its external action. This is a particular manifestation of the consistency between the EU internal and external policies that Article 21(3) TEU and Article 7 TFEU call for.[11] Formulated in binding terms,[12] the overarching EU rule of law mandate is indeed intended to permeate the exercise of *all* its (external) competences.[13] Article 21(3) TEU thus foresees that the EU "shall respect the principles and pursue the objectives [including the rule of law]… in the development and implementation of the different areas of [its] external action … and of the external aspects of its other policies". Article 205 TFEU further insists on that mandatory mainstreaming when stipulating that the EU external action based on the TFEU "shall be guided by the principles, pursue the objectives and be conducted in accordance with the general provisions laid down in Chapter 1 of Title V of the Treaty on European Union" that establish the "General Provisions on the Union's External Action". Thus, the EU external trade, development, and migration policies, as well as the external facets of other Union's competences, shall all pursue the central EU rule of law promotion objective of the EU's external action.[14]

Importantly, Article 23 TEU applies the same grammar to the Common Foreign and Security Policy (CFSP), including the Common Security and Defence Policy (CSDP): it "shall [equally] be guided by the principles, (…) pursue the objectives of, and be conducted in accordance with, the general provisions laid down in [the same] Chapter 1", including Article 21 TEU. While subject to "specific *rules and procedures*" (emphasis added),[15] the "development and implementation" of the CFSP are nevertheless determined by the *same objectives*, including the promotion of the rule of law, as any other EU competence. The policy is also guided by the *same*

---

[11] On the importance of the principle of consistency, see Case C-156/21, *Hungary v Parliament and Council,* EU:C:2022:97, ¶128; Case C-263/14, *Parliament v Council (Tanzania)*, EU:C:2016:435, ¶72.

[12] On the binding character of Article 3(5) TEU, see e.g. Case C-363/18, *Organisation Juive Européenne*, EU:C:2019:954, ¶48; Case C-366/10, *Air Transport Association of America and Others*, EU:C:2011:864, ¶101; Case 266/16 *Western Sahara,* EU:C:2018:118, and of Article 21(1) TEU, see e.g. T-125/22, *RT France*, EU:T:2022:483, ¶85.

[13] See also: Marise Cremona, "Values in Foreign Policy" in Malcolm Evans and Panos Koutrakos (eds), *Beyond the Established Orders: Policy interconnections between the EU and the rest of the world* (Hart, 2011), p. 275.; Till Patrick Holterbus, "The Legal Dimensions of Rule of Law Promotion in EU Foreign Policy – EU Treaty Imperatives and Rule of Law Conditionality in the Foreign Trade and Development Nexus", in Till Patrick Holterbus (ed.), *The Law Behind the Rule of Law Transfer* (Nomos, 2019), p. 73. On the importance of foreign policy objectives in constitutions, including that of the EU, see Joris Larik, *Foreign Policy Objectives in European Constitutional Law* (OUP, 2016).

[14] For an illustration see, for instance, Opinion 2/15, *re: EU-Singapore Agreement*, EU:C:2017:376; ¶¶ 143-145. Other provisions reiterate the notion that each external action based on the TFEU must take these principles into account: e.g. Article 207(1) TFEU in the specific case of the Common Commercial Policy, Article 208 TFEU in connection with the development policy, Article 212(1) TFEU as regards the EU "economic, financial and technical cooperation with third countries".

[15] Article 24(1)TEU.

*principles*, and should be conducted in accordance *with the same general provisions*.[16] In other words, and in these respects at least, the CFSP is not distinct from any other EU (external) competence and exercise thereof.[17]

Incidentally, while buttressing the general requirement of coherence in the EU external action,[18] the formulation of the mainstreaming clauses of Articles 205 TFEU and 23 TEU also captures the separate, yet related constitutional functions which the rule of law is deemed to fulfil therein.[19] Respect for the rule of law is envisaged not only as a *foundation* ("principle") and a *finalité* (an "objective") of the overall external action of the EU, as further expressed in Article 21(3) TEU (which requires the Union to "define and pursue common policies and actions, and ... work for *a high degree of cooperation in all fields of international relations, in order to*: (a) *safeguard its values*… (b) *consolidate and support ... the rule of law*" (emphasis added)). The rule of law also constitutes a *structural principle* that governs the overall operation of the composite system carrying out that action ("shall be conducted in accordance with" as per Articles 23 TEU and 205 TFEU), which itself involves both the EU institutional framework, including the Court of Justice, and the Member States. In short, the rule of law is envisaged as *telos* and *conditio sine qua non* for a Treaty-compliant EU external action.

While conceiving the defense of the rule of law as a general requirement, the EU mandate nevertheless involves a degree of differentiation in the way in which it is to be fulfilled. According to Article 8 TEU, "[t]he Union shall develop *a special relationship* with neighbouring countries, aiming to establish an area of prosperity and good neighbourliness, *founded on the values of the Union*" (emphasis added). The TEU thereby comprises a specific legal basis for the Union to project, apply, and defend the rule of law alongside its other values, in relation to a particular group of states ("neighbouring countries"), to found and structure a broader political area.[20] In

[16] See e.g. Case C-872/19P, *Venezuela v Council,* EU:C:2021:507, ¶49; Case C-134/19 P, *Bank Refah Kargaran v. Council and Commission*, EU:C:2020:793, ¶35; Case C-455/14P, *H* v *Council and Others*, EU:C:2016:569, ¶41, Case C-263/14, *Parliament v Council (Tanzania)*, EU:C:2016:435, ¶47. On the specificity of the CFSP and its limits, see e.g. Geert de Baere, *Constitutional principles of EU external relations* (OUP, 2008); Graham Butler, *Constitutional Limits of the EU's Common Foreign and Security Policy* (University of Copenhagen, 2016).

[17] Case C-263/14, *Parliament v Council (Tanzania),* EU:C:2016:435. On the importance of this constitutional requirement for the CFSP, see discussion in section 3.1.

[18] Further see e.g. Isabelle Bosse-Platière, *L'article 3 du traité UE : Recherche sur une exigence de cohérence de l'action extérieure de l'Union europénne* (Bruylant, 2014), Simon Duke, "Consistency, coherence and European Union external action: the path to Lisbon and beyond", in Panos Koutrakos (ed.), *European Foreign Policy* (Elgar, 2011), p. 15; Marise Cremona, "Coherence in European Union foreign relations law" in Panos Koutrakos (ed.), *European Foreign Policy* (Elgar, 2011), p. 55; Christophe Hillion, "*Tous pour un, Un pour tous!* Coherence in the External relations of the European Union" in M. Cremona (ed.), *Developments in EU External Relations Law*, Collected Courses of the Academy of European Law, (OUP, 2008) p. 10.

[19] More on this: Werner Schroeder, "an active EU rule of law policy" in Allan Rosas, Pekka Pohjankoski, Juha Raitio (eds), *The Rule of Law's Anatomy in the EU: Foundations and Protections* (Hart, forthcoming); Hillion, "Overseeing the rule of law", op. cit.

[20] Article 8 TEU could thus provide the constitutional foundation for the EU to engage in the development of the European Political Community launched in the wake of Russia's invasion of Ukraine; see European Council Conclusions, 23-24 June 2022. Further on Article 8 TEU: Marise Cremona and Niamh Nic Shuibhne, "Integration, Membership and the EU Neighbourhood", (2022) 59 (Special Issue) *Common Market Law Review* p. 155; Christophe Hillion, "Anatomy of EU norms export towards the

connection to that specific mandate, Article 49 TEU links a state's eligibility for EU membership to its respect for, and promotion of the Union's founding values, including the rule of law.

Elaborate and multi-dimensional, if slightly confusing considering the diversity of its Treaty formulations (viz. the EU shall "uphold and promote", "consolidate and safeguard" and be "guided by" the rule of law in its external action, it should also "seek to advance [it] in the wider world" as one of its "values", as well as a "principle" that has been central to the EU own existence and development), the EU external rule of law mandate calls for an equally multidimensional operationalization, and in turn a coherent, systemic approach to fulfill it effectively. The next sections examine some of the means the EU and Member States have mobilised to promote and uphold the rule of law outside the EU. The discussion will subsequently turn to exploring (some of) the legal mechanisms available to ensure that, both in its "development and implementation", the EU external action is "conducted in accordance with" the rule of law.

### *2.2. Incremental and eclectic rule of law promotion*

EU institutions have carried out the Union's external rule of law promotion mandate in various ways. In addition to a general advocacy through conditionality, the EU has occasionally reacted to third states' assaults on the rule of law (2.2.1). It has also promoted certain standards in the context of specific foreign policy initiatives, in the pursuit of other objectives and interests (2.2.2). While this development partly reflects the methodology of rule of law promotion by other global protagonists,[21] it also comes from the change in the (external) attributions of the EU, and out of necessity in consideration of global and regional (geo)political developments. At the same time, rule of law regressions within the Union, and its own reactions thereto, have influenced its ability to fulfill its external rule of law mandate. A feedback loop appears to operate between the latter's internal and external facets: while the instruments which the EU has mobilized in its relations with the wider world have, at least to some extent, foreshadowed the articulation of EU mechanisms to safeguard the rule of law internally, the latter have in turn inspired further articulation of the EU external rule of law policy (2.2.3).

The following discussion will give some examples of devices the EU has developed,[22] both to illustrate their variety in terms of content and purpose, and the

neighbourhood – the impact of Article 8 TEU", in Peter van Elsuwege and Roman Petrov (eds.), *Legislative Approximation and Application of EU Law in the Eastern Neighbourhood of the European Union - Towards a Common Regulatory Space?* (Routledge, 2014) p. 13.

[21] See, e.g., Amichai Magen, *The rule of law and its promotion abroad: three problems of scope* [2009] *Stan. J. I. L.* 51; Amichai Magen and Leonardo Morlino, "Hybrid Regimes, the Rule of Law, and External Influence on Domestic Change" in Amichai Magen and Leonardo Morlino (eds), *International Actors, Democratization, and the Rule of Law* (Routledge, 2009).

[22] For a general appraisal, see e.g. Laurent Pech, "Rule of Law as a guiding principle of the EU's external action", *CLEER Working Papers* 2012/3; from the same author: "Promoting the Rule of Law Abroad: On the EU's Limited Contribution to the Shaping of an International Understanding of the Rule of Law", in Dimitry Kochenov and Fabian Amtenbrink (eds), *The European Union's Shaping of the International Legal Order* (CUP, 2013), p. 108; Geert de Baere, "European Integration and the Rule of Law in Foreign Policy", in Julie Dickson and Pavlos Eleftheriadis (eds), *Philosophical Foundations of European Union Law* (OUP, 2012) p. 354; see also, Holterbus, op. cit.

incremental move they embody towards a more substantial external rule of law policy. It will also probe their congruence with the overall EU mandate to promote and uphold the rule of law, recalled above (2.2.4).

2.2.1. Conditionality and sanctions

2.2.1.a The essential elements clause

A traditional device of EU rule of law promotion is the so-called *essential elements clause* which the Union (and Member States) has often included in its external agreements.[23] For example, Article 2 of the Association Agreement between the EU and Ukraine foresees that:

> Respect for democratic principles, human rights and fundamental freedoms, as defined in particular in the Helsinki Final Act of 1975 of the Conference on Security and Cooperation in Europe and the Charter of Paris for a New Europe of 1990, and other relevant human rights instruments, among them the UN Universal Declaration of Human Rights and the European Convention on Human Rights and Fundamental Freedoms, and *respect for the principle of the rule of law shall form the basis of the domestic and external policies of the Parties and constitute essential elements of this Agreement* (emphasis added). [24]

Labelling respect for the rule of law as "essential element" of an agreement entails that, in principle, one party may suspend the application of the agreement,[25] should it consider that the other party has breached the rule of law.[26] The suspension may occur without prior consultation in derogation from the usual requirements of public international law. Alongside the parties' observance of democratic principles and human rights, respect for the rule of law is thus envisaged as a precondition for the continuation (and development) of the relationship between them. Equivalent clauses have featured in different types of EU agreements, including association,[27]

[23] Further on such clauses and their operationalisation, see e.g. Lorand Bartels, *Human Rights Conditionality in the EU's International Agreements* (OUP, 2005); Mielle Bulterman, *Human Rights in the Treaty Relations of the European Community: Real Virtues or Virtual Reality?* (Intersentia, 2001); Barbara Brandtner and Allan Rosas, "Human Rights and the External Relations of the European Community: An Analysis of Doctrine and Practice" (1998) 9 *European Journal of International Law* p. 468.

[24] Association Agreement between the European Union and its Member States, of the one part, and Ukraine, of the other part, *OJ L 161, 29.5.2014, p. 3–2137*. Further on this agreement, see Guillaume Van Der Loo, *The EU-Ukraine Association Agreement and Deep and Comprehensive Free Trade Area - A New Legal Instrument for EU Integration Without Membership* (Brill, 2016); Guillaume Van der Loo, P. Van Elsuwege and R. Petrov, "The EU-Ukraine Association Agreement: Assessment of an Innovative Legal Instrument", *EUI Working Papers*, Law 2014/09.

[25] See in this sense: Case C-268/94, *Portugal v. Council*, EU:C:1996:461.

[26] In the case of the EU-Ukraine Association agreement, see Article 478(2)(b).

[27] See e.g. Article 2 of the Stabilisation and Association Agreement between the European Communities and their Member States, of the one part, and the former Yugoslav Republic of Macedonia, *OJ L 84, 20.3.2004, p. 13–197.*

development cooperation[28] and partnership agreements.[29] Even the post-Brexit EU-UK Trade and Cooperation Agreement does, albeit in its preamble rather than in the main part of the agreement as is usually the case in other agreements. [30]

Although the inclusion of essential element clauses became systematic from the 1990s,[31] the specific reference to the rule of law as a *distinct* essential element, alongside human rights and democracy, is a more recent phenomenon. It does not mean that the rule of law was considered less important. Rather the earlier formulation(s) of essential elements clauses reflected a more general trend whereby the rule of law was subsumed under human rights and democracy.[32] A case in point is the Charter of Paris for a New Europe to which the essential elements clause inserted in EU agreements with European neighbours have often cross-referred, as a source of democratic principles, human rights and fundamental freedoms to be respected by the parties.[33]

While late and still unsystematic, the inclusion of the rule of law as distinct "essential element" (and indeed as distinct "principle", and subsequently "value" in EU parlance)[34] has involved a degree of substantive indeterminacy. Contrary to mentions of democracy and human rights, respect for the rule of law has not, at least not always, cross-referred to particular (external) sources, let alone include specific

[28] The Cotonou Agreement (EU-ACP) is a case in point: Partnership Agreement between the members of the African, Caribbean and Pacific Group of States of the one part, and the European Community and its Member States, of the other part, *OJ L 317, 15.12.2000, p. 3–353*, see further on this agreement: Holterbus, op. cit.; Andreas Moberg, "The Condition of Conditionality – Closing in on 20 Years of Conditionality Clauses in ACP-EU Relations", (2015) 60 *Law and Development*, *Scandinavian Studies in Law* p. 275.

[29] See Article 1 of Framework Agreement on Partnership and Cooperation between the European Union and its Member States, of the one part, and the Republic of the Philippines, of the other part, *OJ L 343, 22.12.2017, p. 3–32.*

[30] Pt. 1 of the Preamble of the Trade and Cooperation Agreement between the European Union and the European Atomic Energy Community, of the one part, and the United Kingdom of Great Britain and Northern Ireland, of the other part, *OJ L 149, 30.4.2021, p. 10–2539.*

[31] See European Council, *Declaration on Human Rights*, Annex V, Presidency Conclusions, June 1991, paragraph 11; European Commission, *The inclusion of respect for democratic principles and human rights agreements between the Community and third countries*, COM(95) 216.

[32] See, for instance, Article 2 of the Agreement on Partnership and Cooperation establishing a Partnership between the European Communities and their Member States, of one part, and the Russian Federation, of the other part, *OJ L 327, 28.11.1997, p. 3–69;* Article 2 of the Economic Partnership, Political Coordination and Cooperation Agreement between the European Community and its Member States, of the one part, and the United Mexican States, of the other part, *OJ L 276, 28/10/2000 pp. 45–79.*

[33] OSCE, *Charter of Paris for a New Europe*, 21 November 1990 < https://www.osce.org/mc/39516>.

[34] Other notions have been referred to in EU official documents, foreshadowing the emergence of the rule of law narrative: "compliance with the law" was thus mentioned alongside the principles of democracy and human rights in paragraph 5 of the Preamble of the 1986 Single European Act (*OJ L 169, 29.6.1987, p. 1*), the 1991 European Council *Declaration on Human Rights* (mentioned above) evoked "the principle of primacy of the law"; "the rule of law" then appeared in the preamble (para. 3) of the 1992 Treaty on European Union (Maastricht), as one of the principles to which the Parties are attached, alongside those of liberty, democracy and respect for human rights and fundamental freedoms. It is only in the 1996 TEU (Amsterdam) that the rule of law features in the main body of the Treaty (Article 6 TEU) as one of the founding principles of the EU, common to the Member States. Further on the genealogy of the rule of law, See e.g. Laurent Pech, "The Rule of law" in Paul Craig and Gráinne de Búrca (eds), *The Evolution of EU law* (OUP, 2021), p. 307.

standards.[35] Problematic in itself in terms of legal certainty,[36] the absence of elements to operationalize the parties' essential obligation to respect the rule of law is all the more remarkable since the latter is envisaged not only as an essential element of the agreement, but also as "the basis of the domestic and external policies of the Parties".[37] In principle therefore, it constitutes a general standard against which the parties assess each other's general conduct, beyond the context of the application of the agreement, for the purpose of determining the latter's continuation and evolution.

Admittedly, the provisions underpinning the EU rule of law promotion mandate discussed above, suggest that it is in principle the same rule of law that is to be observed within the EU, and the one which it promotes externally. This is also what the formula "basis of the *domestic and external* policies" (emphasis added) may point to. The challenge however is that the rule of law as EU value has itself suffered from a degree of substantive ambiguity and contestation within the Union, [38] even if that alleged ambiguity is being reduced.[39] Moreover, practice suggests that the internal-external parallelism does not always operate. Some EU external agreements do occasionally refer to non-EU sources, such as the UN Charter or OSCE documents.

---

[35] See Article 2 of the EU-Ukraine agreement mentioned above. Cf. Article 2 of the Comprehensive and enhanced Partnership Agreement between the European Union and the European Atomic Energy Community and their Member States, of the one part, and the Republic of Armenia does relate the rule of law to external sources when foreseeing that "1. Respect for the democratic principles, *the rule of law*, human rights and fundamental freedoms, *as enshrined in particular in the UN Charter, the OSCE Helsinki Final Act and the Charter of Paris for a New Europe of 1990, as well as other relevant human rights instruments such as the UN Universal Declaration on Human Rights and the European Convention on Human Rights,* shall form the basis of the domestic and external policies of the Parties and constitute an essential element of this Agreement" (emphasis added), *OJ L 23, 26.1.2018, p. 4–466.*

[36] As stipulated in Article 2(a) of Regulation (EU, Euratom) 2020/2092 of the European Parliament and of the Council of 16 December 2020 on a general regime of conditionality for the protection of the Union budget, *OJ L 433I , 22.12.2020, p. 1–10*. Further on legal certainty as an element of the rule of law, see e.g. Venice Commission, *Rule of Law Checklist* (March 2016): <https://www.venice.coe.int/images/SITE%20IMAGES/Publications/Rule_of_Law_Check_List.pdf>; Anna Gamper, "Legal Certainty", in Werner Schroeder (ed.) *Strengthening the rule of law in Europe* (Hart, 2019), p. 80.

[37] Respect for democratic principles, human rights and fundamental freedoms occasionally feature as basis of the domestic and external policies of the parties too; e.g. Art 2 EU-Armenia agreement, mentioned above.

[38] See e.g. the arguments of the Polish and Hungarian governments in Case C-156/21 *Hungary v Parliament and Council*, EU:C:2022:97, and Case C-157/21 *Poland v Parliament and Council*, EU:C:2022:98, respectively.

[39] See e.g. EU Council, *Conclusions of the Council of the European Union and the Member States meeting within the Council on Ensuring Respect for the Rule of Law*, General Affairs Council meeting, Brussels, 16 Dec. 2014; COREPER; *Ensuring the respect for the rule of law - Dialogue and exchange of views,* Brussels, 9 Nov. 2015; European Commission, *A new EU framework to strengthen the Rule of Law*, COM(2014)158 final. Further on the vagueness v. clarity of Article 2 TEU: see e.g. Dimitrios Spieker, *EU Values before the Court of Justice. Foundations, Potential, Risks* (OUP, 2023, forthcoming), Marcus Klamert and Dimitry Kochenov, "Article 2 TEU" in Manuel Kellerbauer, Marcus Klamert and Jonathan Tomkin (eds.), *The Treaties and the Charter of Fundamental Rights – A Commentary* (OUP, 2023), (Available at SSRN: https://ssrn.com/abstract=); Laurent Pech, "The Rule of Law as a Well-Established and Well-Defined Principle of EU Law" (2022) 14 *Hague Journal on the Rule of Law* p.107; Inge Govaere, "Promoting the Rule of Law in EU External Relations: A Conceptual Framework", College of Europe, *Research Papers in Law*, 3/2022; Werner Schroeder, "The Rule of Law As a Value in the Sense of Article 2 TEU: What Does it Mean and Imply?", in Armin Von Bogdandy *et al.* (eds), *Defending Checks and Balances in EU Member States* (Springer, 2021), p. 105; Lucia Rossi, "La valeur juridique des valeurs. L'article 2 TUE : relations avec d'autres dispositions de droit primaire de l'UE et remèdes juridictionnels' (2020) 56 *Revue Trimestrielle de Droit Européen* p. 639.

While such cross-referencing may well reflect the significance of those documents as inspiration for the EU internal articulation of the rule of law, the fact that they are mentioned in some EU agreements but not in others, or that their formulation differs from one essential element clause to the other, muddies the definition, and questions the significance of the rule of law being promoted. Indeed it begs the question of whether the EU applies variable standards and prescriptions depending on the partner involved, and if so, whether this differentiation is consistently applied, and whether it corresponds to the graduation envisaged by the Treaty-based mandate discussed above.[40]

2.2.1.b Uses and effects of the essential elements clause

In practice, the EU rule of law promotion through essential elements clauses has remained proclamatory and general, rather than operative and targeted. The activation of the suspension mechanism in reaction to non-observance has been sporadic at best. Relied on several times in the context of the EU development agreement with ACP countries (the co-called Cotonou Agreement),[41] which indeed contains a more elaborate essential element clause,[42] it has rarely been used in the context of other EU agreements. Tellingly, the clause has still not been invoked, let alone triggered, in the context of the EU Partnership and Cooperation Agreement (PCA) with the Russian Federation[43] despite the latter's successive annexations of several parts of Ukraine since 2014 in blatant violation of international law, and of the different norms to which the Agreement's essential clause refers.[44] The EU has instead relied on a security provision of the PCA to make the adoption of its unilateral sanctions in reaction to the invasion(s) legally possible, while maintaining the Agreement in force.[45] By contrast, the EU suspended the ratification of an equivalent PCA with Belarus in the 1990s,

[40] For instance, the formulation of the essential clauses included respectively in the above-mentioned EU-Ukraine Association Agreement (Article 2) and in the EU-Moldova Association Agreement (Article 2, Association Agreement between the European Union and the European Atomic Energy Community and their Member States, of the one part, and the Republic of Moldova, of the other part, *OJ L 260, 30.8.2014, p. 4–738)* differ even if the two countries belong to the same category of neighbouring European states, and as such covered in principle by the same EU policy framework, viz. the so-called Eastern Partnership (<https://www.eeas.europa.eu/eeas/eastern-partnership_en>), and Article 8 TEU.

[41] Partnership Agreement between the members of the African, Caribbean and Pacific Group of States of the one part, and the European Community and its Member States, of the other part, *OJ L 317, 15.12.2000, p. 3–353.* See in particular, Articles 9 and 96 of the Agreement.

[42] See European Commission/High representative of the Union for Foreign Affairs and Security Policy, *Evaluation of the Cotonou Partnership Agreement*, SWD(2016) 250 <https://international-partnerships.ec.europa.eu/system/files/2019-09/evaluation-post-cotonou_en.pdf> (p. 38), further see Holterbus, op. cit.; Moberg, op. cit.

[43] Partnership and Cooperation Agreement establishing a Partnership between the European Communities and their Member States, of one part, and the Russian Federation, of the other part, *OJ L 327, 28.11.1997, p. 3–69.*

[44] It was not affected by Russia's military campaign in Georgia in 2008 either, let alone by Russia's Constitutional Court 2016 decision that rulings of the European Court of Human Rights would not be implemented if in contradiction with Russia's constitution.

[45] Under Article 99 of the PCA, see in this respect, Case C-72/15, *Rosneft*, EU:C:2017:236.

following the regime's repression of the political opposition and human rights violations.[46]

Outside the framework of bilateral agreements, the EU has occasionally made use of *restrictive measures* (a.k.a "sanctions") in reaction to the regression of the rule of law in third states.[47] For example, the EU adopted such sanctions against Venezuela in consideration of the "continuing deterioration of democracy, the rule of law and human rights" in the country.[48] The Union also reacted to the "continuing deterioration of the rule of law" in the Republic of the Maldives by imposing targeted restrictive measures "against persons and entities responsible for undermining the rule of law".[49] Similar targeted sanctions were established "against natural persons responsible for undermining democracy or the rule of law in Lebanon", and in Belarus.[50] As the General Court underscored, "[t]hose measures constitute targeted preventive measures, which are intended, in accordance with Article 21(2)(b) TEU, to consolidate and support democracy, the rule of law, human rights and the principles of international law".[51]

As with essential elements clauses however, the deployment of EU sanctions specifically in response to rule of law violations, has been more selective than systematic.[52] More EU sanctions have been enacted in reaction to fundamental rights violations, or to fight terrorism.[53] It should be noted that the establishment of EU restrictive measures traditionally involves the adoption of CFSP decision by the

---

[46] See e.g. Giselle Bosse and Elena Korosteleva-Polglase, "Changing Belarus? The Limits of EU Governance in Eastern Europe and the Promise of Partnership", (2009) 44 *Cooperation and Conflict*, p. 143.

[47] Further on the EU use of sanctions, see General Secretariat of the Council, Sanctions Guidelines – update, 4 May 2018: <https://data.consilium.europa.eu/doc/document/ST-5664-2018-INIT/en/pdf>

[48] Preamble, pt. 1, Council Regulation (EU) 2017/2063 of 13 November 2017 concerning restrictive measures in view of the situation in Venezuela, *OJ L 295, 14.11.2017, p. 21–37.*

[49] Council Decision (CFSP) 2018/1006 of 16 July 2018 concerning restrictive measures in view of the situation in the Republic of Maldives, *OJ L 180, 17.7.2018, p. 24–28. Repealed since:* Council Decision (CFSP) 2019/993 of 17 June 2019 repealing Decision (CFSP) 2018/1006 concerning restrictive measures in view of the situation in the Republic of Maldives; *OJ L 160, 18.6.2019, p. 25–25*

[50] Preamble, Council Decision (CFSP) 2021/1277 of 30 July 2021 concerning restrictive measures in view of the situation in Lebanon; *OJ L 277I, 2.8.2021, p. 16–23;* Council Decision 2012/642/CFSP of 15 October 2012 concerning restrictive measures against Belarus, *OJ L 285, 17.10.2012, p. 1–52.*

[51] See e.g. Case T-536/21, *Belaeronavigatsia*, EU:T:2023:66, ¶34.

[52] On the use of EU sanctions more generally, see e.g. Allan Rosas, "Is the EU a Human Rights Organisation", *CLEER Working Papers* 2011/1 <https://www.asser.nl/media/1624/cleer-wp-2011-1-rosas.pdf >, further on EU sanctions, see Christina Eckes, "The law and practice of EU sanctions", in Steven Blockmans and Panos Koutrakos (eds.), *Research Handbook on EU Common Foreign and Security Policy* (Elgar, 2017) p. 206.

[53] The EU has indeed established specific horizontal sanctions regimes targeting: serious human rights violations (Council Decision (CFSP) 2020/1999 of 7 December 2020 concerning restrictive measures against serious human rights violations and abuses, *OJ L 410I, 7.12.2020, p. 13–19)*, terrorism (Council Common Position 2001/931/CFSP of 27 December 2001 on the application of specific measures to combat terrorism (*OJ L 344, 28.12.2001, p. 93*), cyber-attacks (Council Decision (CFSP) 2020/1127 of 30 July 2020 amending Decision (CFSP) 2019/797 concerning restrictive measures against cyber-attacks threatening the Union or its Member States, *OJ L 246, 30.7.2020, p. 12–17)*, the proliferation and the use of chemical weapons Council Decision (CFSP) 2018/1544 of 15 October 2018 concerning restrictive measures against the proliferation and use of chemical weapons, *OJ L 259, 16.10.2018, p. 25–30),* but not with respect to violations of the rule of law in particular.

Council, which requires unanimous support of the Member States.[54] In other words, the EU reaction to the deterioration of the rule of law may be held back by one single government.[55]

To be sure, not all third states with which the Union has negotiated international agreements have been receptive to its rule of law promotion, and particularly to the standard inclusion of an essential element clause. The latter was resisted by several EU partners, eventually preventing the Union's conclusion of bilateral agreements with them. Australia and New Zealand are cases in point, [56] one of the arguments being that the EU has no value lessons to give to such countries. Its inclusion in the *preamble* of the EU-UK TCA rather than in its operational part stems from the same argument, and suggests that the prominence and potency of the essential elements clause in a relationship is a matter of negotiation. The EU itself does not always seem to prioritize the promotion of the rule of law over other interests it may have with the country at hand, or simply lacks the leverage to impose it. Hence, the EU-China 2020 Strategic Agenda for Cooperation did not mention the rule of law even once. The 16-page EU-China Strategic Outlook, which the Commission and the High Representative prepared in 2019, mentioned it only in passing, while the EU-China Summit Joint statement of the same year did not refer to it at all.[57] A degree of transactionalism thus seems to infuse the way in which the EU carries out its external rule of law promotion mandate.[58]

2.2.1.c Positive conditionality

Alongside negative conditionality and occasional sanctions, the EU has also promoted the rule of law through supportive measures (positive conditionality). While reducing, or suspending EU support in case of deterioration of the rule of law is still envisaged, some EU instruments typically encompass positive financial and/or trade

[54] Though it may be wondered whether such a CFSP decision could be adopted with some Member States abstaining, in line with Article 31(1)2nd subpara. TEU (so-called "constructive abstention").

[55] The Hungarian government's obstructive postures concerning the adoption of sanctions against the Russian Federation in the wake of its invasion of Ukraine is a case in point: <https://www.reuters.com/world/europe/hungary-holds-up-eu-sanctions-package-overpatriarch-kirill-diplomats-2022-06-01/>; <https://hungarytoday.hu/viktor-orban-hungariangovernment-oil-embargo-agreement-eu-russian-sanctions/>. The government has also challenged existing sanctions on the basis of a "national consultation" <https://abouthungary.hu/blog/here-are-the-questions-from-hungarys-next-consultation-on-brussels-failed-sanctions>; <https://www.politico.eu/article/germany-annalena-baerbock-hungary-europe-play-poker-aid-ukraine/>. Further on this point, see: Mitchel O. Orenstein and Daniel Kelemen, "Trojan Horses in EU Foreign Policy" (2017) 55 *JCMS* p. 87.

[56] Opting instead for a political document in the form of a "Joint Declaration on EU-Australia Relations", signed in Luxembourg on 26 June 1997 (Bull. EU 6-1997. point 1.4.103). On the reluctance of third states to the EU inclusion of standard essential elements clauses, see Vaughne Miller, "The Human Rights Clause in the EU's External Agreements" (2004) House of Commons Research Papers 04/33 <https://researchbriefings.files.parliament.uk/documents/RP04-33/RP04-33.pdf >, see also e.g. Brandtner and Rosas, op. cit.

[57] Brussels, 9 April 2019. In the same vein, see the Council Press Release, "Delivering results by standing firm on EU interests and values" of 30 December 2020, that followed the meeting of EU and China leaders. Despite its ambitious heading, the document hardly contained references to EU values: <https://www.consilium.europa.eu/media/47718/press-release.pdf>.

[58] The EU approach to China has allegedly evolved since the adoption of the EU horizontal sanction regimes targeting serious human rights violations (op. cit.): see Frank Hoffmeister, "Strategic Autonomy in the European Union's External Relations Law" (2023) 60 *CMLRev* p. 667.

incentives, or technical support, to encourage a state to respect the rule of law.[59] One example is the 2021 Regulation establishing the *Neighbourhood, Development and International Cooperation Instrument – Global Europe* (NDICI), which foresees that:

> The general objectives of the Instrument are to: (a) *uphold and promote the Union's values, principles and fundamental interests worldwide, in order to pursue the objectives and principles of the Union's external action, as laid down in Article 3(5) and Articles 8 and 21 TEU*, thus contributing to the reduction and, in the long term, the eradication of poverty, to *consolidating, supporting and promoting democracy, the rule of law* and respect for human rights, sustainable development and the fight against climate change and addressing irregular migration and forced displacement, including their root causes (emphasis added).[60]

Despite its slightly tautological formulation, the Regulation is thus conceived as a general instrument for the promotion of the Union's *values*, including the rule of law. That promotion is formulated as an end in itself, in line with the general Treaty prescriptions - indeed explicitly recalled in the Regulation's mission statement.

Yet, as it has been the case of some essential elements clauses, the Regulation does not systematically treat the rule of law as a distinct item alongside human rights and democracy, but rather incorporates it therein, partly contributing to the lingering indeterminacy evoked above, and the limitations in terms of operationalisation and effectiveness of its promotion.[61] Annex III of the Regulation which establishes "areas of intervention" for thematic programmes thus comprises a section devoted to "human rights and democracy", under which support of the rule of law is mentioned, in general terms.

Promoted as a value, the (observance of the) rule of law is also envisaged as a *means* to achieving a patchwork of purposes, reflecting that the instrument is designed

---

[59] See for instance the so-called "System of Generalised Preferences" (GSP): Regulation (EU) No 978/2012 of the European Parliament and of the Council of 25 October 2012 applying a scheme of generalised tariff preferences and repealing Council Regulation (EC) No 732/2008; *OJ L 303, 31.10.2012, p. 1–82.* Further Holterbus, *op. cit.* See also Regulation (EU) 2021/692 of the European Parliament and of the Council of 28 April 2021 establishing the Citizens, Equality, Rights and Values Programme and repealing Regulation (EU) No 1381/2013 of the European Parliament and of the Council and Council Regulation (EU) No 390/2014; *OJ L 156, 5.5.2021, p. 1–20*

[60] Article 3(1) ("Objectives of the Instrument"), Regulation (EU) 2021/947 of the European Parliament and of the Council of 9 June 2021 establishing the Neighbourhood, Development and International Cooperation Instrument – Global Europe, *OJ L 209, 14.6.2021, p. 1–78.*

[61] According to that section 1: "Developing, supporting, consolidating and protecting democracy, addressing all aspects of democratic governance, including reinforcing political pluralism, representation, and accountability, reinforcing democracy at all levels, enhancing citizen and civil society participation, supporting credible, inclusive and transparent electoral processes as well as supporting citizen capacity in monitoring democratic and electoral systems, through the support to domestic citizen election observation organisations and their regional networks. Democracy shall be strengthened by upholding the main pillars of democratic systems, democratic norms and principles, free, independent and pluralistic media, both online and offline, internet freedom, the fight against censorship, accountable and inclusive institutions, including parliaments and political parties, and the fight against corruption. *Union assistance shall support civil society action in strengthening the rule of law, promoting the independence of the judiciary and of the legislature, supporting and evaluating legal and institutional reforms and their implementation, monitoring democratic and electoral systems and promoting access to affordable justice for all, including to effective and accessible complaint and redress mechanisms at national and local level*" (emphasis added).

to cover different types of countries and EU relations therewith. While contributing to "developing, supporting, consolidating and protecting democracy", the rule of law is also instrumental to fighting poverty, to stimulating economic development, and to combatting climate change,[62] which are all aims that feature in the long list of EU external objectives set out in Article 21(2) TEU, without clear prioritization.

The preamble of the Regulation indeed stipulates that: "[a]s the respect for democracy, human rights and the rule of law is *essential for sound financial management and effective Union funding* as referred to in the Financial Regulation, *assistance could be suspended in the event of degradation in democracy, human rights or the rule of law in third countries*" (emphasis added). Though EU financial support is deemed to incentivize observance of the rule of law to consolidate democracy, regression therefrom may conversely entail suspension of EU support not only because the deterioration in the respect of values should in itself be sanctioned, but also to preserve the "sound financial management and effective Union funding". Formulated more bluntly, the NDICI Regulation thereby mirrors the functional connection which the 2020 EU Conditionality Regulation established internally between the rule of law and the defence of the EU financial interests, incidentally reflecting the expected continuum between the internal and external conceptions of the rule of law.[63] Indeed, the interpretation and application of one instrument could well colour the way the other is activated too.[64]

2.2.2. Targeted export of standards

In addition to promoting and upholding the rule of law in general terms through conditionality mechanisms and restrictive measures, the EU has progressively engaged in targeted export of specific rule of law standards. For example, the EU has occasionally been involved in the design (and operation) of third states' justice and law-enforcement systems based on (more or less) specific canons of legal protection, as part of the country's political transition.

Somewhat paradoxically considering its institutional specificity, and notably the limited judicial control over the exercise of that competence,[65] the CFSP/CSDP has been used by the EU to set up rule-of-law-based judicial and law enforcement systems abroad. The 2008 *Rule of Law Mission in Kosovo* (EULEX KOSOVO) is a case in point.[66] According to its mission statement, the EU civilian operation was mandated to "assist the Kosovo institutions, judicial authorities and law enforcement agencies in

[62] The connection between the rule of law and other objectives reflects practices of international rule of law promotion more generally. Further on this, see Magen, op. cit.

[63] Regulation (EU, Euratom) 2020/2092 of the European Parliament and of the Council of 16 December 2020 on a general regime of conditionality for the protection of the Union budget, *OJ L 433I, 22.12.2020, p. 1–10*.

[64] See in this regard the Court of Justice rulings in Case C-156/21, *Hungary v Parliament and Council,* EU:C:2022:97 and Case C-157/21, *Poland v Parliament and Council*, EU:C:2022:98, and the activation of the General Conditionality mechanism against Hungary: see Press release "Rule of law conditionality mechanism: Council decides to suspend €6.3 billion given only partial remedial action by Hungary" 12 December 2022: <https://www.consilium.europa.eu/en/press/press-releases/2022/12/12/rule-of-law-conditionality-mechanism/>.

[65] See discussion under section 3.1.

[66] Council Joint Action 2008/124/CFSP on the European Union Rule of Law Mission in Kosovo, EULEX KOSOVO, *OJ L 42, 16.2.2008, pp. 92-98.*

their progress towards sustainability and accountability and in *further developing and strengthening an independent multi-ethnic justice system and multi-ethnic police and customs service, ensuring that these institutions are free from political interference and adhering to internationally recognised standards and European best practices*" (emphasis added).[67] To that effect, the EU mission was tasked to monitor, mentor and advise Kosovo's authorities, while "retaining certain executive responsibilities", [68] in particular "to ensure the maintenance and promotion of the rule of law, public order and security",[69] acting in accordance with "international standards concerning human rights and gender mainstreaming".[70] An earlier EU Rule of Law Mission was established in relation to Georgia "to assist the new government in its efforts to bring local standards with regard to rule of law closer to international and EU standards".[71]

The EU has also exported specific standards of judicial protection through external agreements based on, and in support to, EU CSDP operations. Thus, the 2011 CFSP Agreement between the European Union and the Republic of Mauritius ("on the conditions of transfer of suspected pirates and associated seized property from the European Union-led naval force to the Republic of Mauritius and on the conditions of suspected pirates after transfer")[72] includes a specific provision concerning the "*Treatment, prosecution and trial of transferred persons*". Article 4 of the Agreement enumerates obligations binding Mauritius authorities to provide some legal protection to persons intercepted and transferred by the EU-led naval force (EUNAVFOR/*Atalanta*).[73] The list includes the duty to ensure that any transferred person be brought promptly before a judge or other officer, be entitled to trial within a reasonable time, and to a fair and public hearing by a competent, independent and impartial tribunal established by law, while being presumed innocent until proved guilty according to law. The same provision requires that transferred persons be entitled to various minimum guarantees, including that of being informed promptly and in detail in a language which he understands, of the nature and cause of the charge against him, of having adequate time and facilities for the preparation of his defence and to communicate with counsel of his own choice.[74]

---

[67] Article 2, Council Joint Action, EULEX KOSOVO.

[68] Ibid.

[69] Article 3 (h), Council Joint Action, EULEX KOSOVO.

[70] Article 3 (i), Council Joint Action, EULEX KOSOVO.

[71] Preamble, pt. 3, Council Joint Action 2004/523/CFSP on the European Union Rule of Law Mission in Georgia, EUJUST THEMIS; *OJ L 228, 29.6.2004, p. 21*.

[72] Agreement between the European Union and the Republic of Mauritius on the conditions of transfer of suspected pirates and associated seized property from the European Union-led naval force to the Republic of Mauritius and on the conditions of suspected pirates after transfer; *OJ L 254, 30.9.2011, p. 3-7.*

[73] Council Joint Action 2008/851/CFSP of 10 November 2008 on a European Union military operation to contribute to the deterrence, prevention and repression of acts of piracy and armed robbery off the Somali coast, *OJ L 301, 12.11.2008, p. 33–37.*

[74] Article 4 of the EU-Mauritius Agreement. Paragraph 6 includes additional minimum guarantees, e.g. "(d) to be tried in his presence, and to defend himself in person or through legal assistance of his own choice; to be informed, if he does not have legal assistance, of this right; and to have legal assistance assigned to him, in any case where the interests of justice so require, and without payment by him in any such case if he does not have sufficient means to pay for it; (e) to examine, or have examined, all evidence against him, including affidavits of witnesses who conducted the arrest, and to obtain the attendance and examination of witnesses on his behalf under the same conditions as witnesses against him; (f) to have the free assistance of an interpreter if he cannot understand or speak the language used in court; (g) not to be compelled to testify against himself or to confess guilt. 7. Any transferred person convicted of a crime shall

The above-mentioned EU instruments indicate that the general ambition of the EU to promote the rule of law in relation to the wider world finds different expressions in its various external policies, including on the basis of the CFSP in line with Article 23 TEU. The EU Agreement with Mauritius is particularly detailed in its enunciation of the standards of legal protection the other party has to observe. That said, it also indicates that the nature and form of the rule of law promotion it encapsulates are primarily determined by the Union's specific foreign policy goals at hand, which those standards are then meant to help achieve. It is indeed noticeable that the Agreement does not contain the essential elements clause discussed above.

Interpreting a similar arrangement concluded between the EU and Tanzania,[75] the Court of Justice held that it "constitutes an *instrument* whereby the European Union pursues the objectives of [CSDP] Operation Atalanta, namely to preserve international peace and security, *in particular by making it possible to ensure that the perpetrators of acts of piracy do not go unpunished*" (emphasis added), "to *render … prosecutions more effective* by ensuring the transfer of the persons concerned to the United Republic of Tanzania *precisely when the Member State with jurisdiction cannot or will not exercise jurisdiction*" (emphasis added), adding that "were there to be no such operation [Atalanta], that agreement would be devoid of purpose". To be sure, the Court of Justice refuted the contention that the agreement was an instrument of judicial cooperation, as argued by the European Parliament to contest the legal basis of the Council decision to conclude it.[76]

Through this type of agreements (e.g. with Mauritius and Tanzania), the EU in effect outsources to its partners' law enforcement authorities the task of prosecuting the individuals whom its mission may intercept and subsequently transfer to those authorities,[77] in accordance with basic standards of legal protection. By the same token, the Union also subcontracts the responsibility of providing legal protection in relation to the measures Member States take under EU mandate. The intercepted and transferred persons do not benefit from judicial protection under EU rule of law standards,[78] which according to Article 47 of the Union's Charter of Fundamental

be permitted to have the right to his conviction and sentence reviewed by, or appealed to, a higher tribunal in accordance with the law of Mauritius."

[75] Agreement between the European Union and the United Republic of Tanzania on the conditions of transfer of suspected pirates and associated seized property from the European Union-led Naval Force to the United Republic of Tanzania, *OJ 2014 L108/3*. Similar arrangements have also been agreed with other countries from the region: Exchange of Letters between the European Union and the Government of Kenya on the conditions and modalities for the transfer of persons suspected of having committed acts of piracy and detained by the European Union-led naval force (EUNAVFOR), and seized property in the possession of EUNAVFOR, from EUNAVFOR to Kenya and for their treatment after such transfer, *OJ 2009 L 79/49*; Exchange of Letters between the European Union and the Republic of Seychelles on the conditions and modalities for the transfer of suspected pirates and armed robbers from EUNAVFOR to the Republic of Seychelles and for their treatment after such transfer, *OJ 2009 L 315/35*.

[76] Case C-263/14, *Parliament v Council (Tanzania),* EU:C:2016:435.

[77] As was already envisaged in Article 12 of Council Joint Action 2008/851/CFSP on a European Union military operation to contribute to the deterrence, prevention and repression of acts of piracy and armed robbery off the Somali coast, op. cit.

[78] Article 3 of the Agreement stipulates that "Any transferred person shall be treated humanely and in accordance with international human rights obligations, embodied in the Constitution of Mauritius, including the prohibition of torture and cruel, inhumane and degrading treatment or punishment, the prohibition of arbitrary detention and in accordance with the requirement to have a fair trial."

Rights, entails that any person whose rights and freedoms guaranteed by EU law are violated should have the right to an effective remedy before a tribunal. Instead, the person transferred by the EU shall be treated humanely "in accordance international human rights obligations".[79] In the same vein, the activities of EULEX Kosovo to fulfil its rule of law mission are to be compliant with "international standards concerning human rights", rather than EU standards. While exporting some norms of legal protection might correspond to the EU rule of law mandate examined above, also in terms of graduating its promotion, those instruments in effect permit the EU and its Member States not to have to fulfil some of their obligations deriving from Article 21 and 23 TEU.[80]

2.2.3. Emerging EU rule of law policy

A more comprehensive and articulate EU projection of rule of law standards has materialized in the context of the EU (on-going) eastward enlargement, which reflects the more prescriptive rule of law mandate the TEU establishes in relation to the Union's neighbours.[81] Following the 1993 meeting of the European Council in Copenhagen and its agreement on the so-called "Copenhagen criteria" for accession, and through the ensuing EU "pre-accession strategy",[82] EU institutions and Member States have actively engaged with candidate states to assist them in meeting the essential membership requirements, including in particular their respect for the rule of law. The latter's prominence has steadily increased, particularly since Bulgaria and Romania acceded to the Union, and against the backdrop of constitutional recession in several Member States. Meeting the elaborated rule of law requirement has indeed become one of the "fundamentals of the accession process": it is a conditio sine qua non for the opening of membership negotiations, and for their advancement and successful conclusion.[83] Respect for the rule of law is not only conceived of, and operationalised as EU founding value to which candidates have to adhere in line with Article 49(1) TEU. It is also envisaged as a structural requirement to ensure the acceding states effective fulfilment of other core membership prerequisites, especially the full application of the EU *acquis*.

The EU enlargement process has in effect prompted the elaboration of an EU external rule of law toolkit. In particular, EU institutions and Member States have enunciated *standards* by reference to internal and external sources,[84] which candidate

[79] Article 4(1) of the Agreement, which otherwise refers in its preamble to "International Human Rights Law, including the 1966 International Covenant on Civil and Political Rights, and the 1984 Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment".

[80] See discussion on EU and Member States' obligations to develop and implement the EU external action in accordance with the Rule of Law, in section 3 below.

[81] See discussion in section 2.1.

[82] E.g. Marc Maresceau, "Pre-accession", in Marise Cremona (ed.), *EU enlargement* (OUP, 2003), p. 9; Christophe Hillion (ed.), "EU enlargement" in Paul Craig and Gráinne de Búrca (eds), *The Evolution of EU Law* (OUP, 2011) p. 187.

[83] See e.g. European Commission, *Enhancing the accession process - A credible EU perspective for the Western Balkans,* COM(2020) 57 final; European Commission, *2022 Communication on EU Enlargement Policy,* COM(2022) 528; EU Council: *Enlargement and Stabilisation and Association Process – Council conclusions*; 13 December 2022; <https://www.consilium.europa.eu/media/60797/st15935-en22.pdf >

[84] E.g. by reference to Council of Europe sources, including the ECHR, reports of the Venice Commission and GRECO, and OSCE sources. See European Commission, *2022 Communication on EU*

countries must fulfil as condition for accession. They have equally developed *techniques* to monitor the candidates' compliance with such standards, and to address potential setbacks.[85] The notion of "reversibility" of the accession process has since become more prominent in the EU methodology and discourse, notably by reference to the rule of law. [86]

Importantly, the progressive articulation of an EU rule of law *policy* towards the candidate countries has been encouraged and regularly endorsed, both in principle and contents, by all the Member States.[87] They have played an essential role in articulating the conditions for joining the Union, and in assessing their fulfilment. In effect, Member States have incrementally codified an EU customary law of membership that comprises more elaborate tools to safeguard the rule of law, and which has subsequently become relevant to address regressions thereof within the EU too. In particular, substantive references and methodologies which the EU and its Member States have elaborated to ascertain that candidates for accession respect the rule of law effectively to operate as Member State, are mimicked by EU instruments aimed at ensuring continuing rule of compliance internally as well.

While the mechanisms enshrined in Article 7 TEU were conceived out of fear of post-accession reversion in terms of compliance with EU founding values,[88] the Cooperation and Verification Mechanism (CVM) applied to Bulgaria and Romania after they entered the Union,[89] foreshadowed the apparent internalization of the EU pre-accession toolbox. Based on the Accession Treaty with those two states, the CVM

---

*Enlargement Policy,* COM(2022) 528; and the references contained therein. Further: Ivan Damjanovski, Christophe Hillion and Denis Preshova, "Uniformity and differentiation in the fundamentals of EU membership - The EU Rule of Law Acquis in the Pre- and Post-accession Contexts" (2020) *EU IDEA Research Papers*, No. 4 < https://euidea.eu/wp-content/uploads/2020/06/euidea_rp_4.pdf >

[85] Further Andi Hoxhaj, "The EU Rule of Law Initiative Towards the Western Balkans", (2021) 13 *Hague Journal on the Rule of Law* p. 143; Lisa Louwerse, Eva Kassoti, "Revisiting the European Commission's Approach Towards the Rule of Law in Enlargement" (2019) 11 *Hague J Rule Law* p. 223; Lisa Louwerse, "Mind the gap: issues of legality in the EU's conceptualisation of the rule of law in its enlargement policy", (2019) 15 *Croatian Yearbook of European Law and Policy* p. 27, e.g. Ronald Janse, "Is the European Commission a credible guardian of the values? A revisionist account of the Copenhagen political criteria during the Big Bang enlargement", (2019) 17 *I.CON*, p. 43.

[86] European Commission, *Enhancing the Accession Process*, op. cit. : "decisions to halt or even reverse the process should be informed by the annual assessment by the Commission in its enlargement package on the overall balance in accession negotiations and the extent to which fundamental reforms, in particular on the rule of law are being implemented" (p. 5).

[87] Christophe Hillion, "The creeping nationalisation of the EU enlargement policy"; (2010) *Swedish Institute for European Policy Studies,* Report 6/2010.

< www.sieps.se/en/publikationer/the-creeping-nationalisation-of-the-eu-enlargement-policy-20106 >

[88] Wojciech Sadurski, "Adding Bite to a Bark: The Story of Article 7, EU Enlargement and Jorg Haider" (2010) *Col. J.Eur. L.* 385, Clemens Ladenburger and Pierre Rabourdin, "La constitutionalisation des valeurs de l'Union – commentaires sur la genèse des articles 2 et 7 du Traité sur l'Union européenne", (2022) 657 *Revue de l'Union européenne*, p. 231. See also: Dimitry Kochenov, "Article 7 TEU: A Commentary on a Much Talked-about "Dead" Provision" (2018) 38 *Polish Yearbook of International Law*, p. 165; Leonard Besselink, The Bite, the Bark and the Howl Article 7 TEU and the Rule of Law Initiatives in András Jakab and Dimitry Kochenov (eds.), *The Enforcement of EU Law and Values: Ensuring Member States' Compliance* (OUP, 2016) p. 128; Bojan Bugarič, 'Protecting Democracy Inside the EU: On Article 7 TEU and the Hungarian Turn to Authoritarianism', in Carlos Closa and Dimitry Kochenov (eds), *Reinforcing Rule of Law Oversight in the European Union* (CUP, 2016) p. 82.

[89] See e.g. Milada Anna Vachudova and Aneta Spendzharova, "The EU's Cooperation and Verification Mechanism: Fighting Corruption in Bulgaria and Romania after EU Accession" (2012) European Policy Analysis*,* 2012:1, p. 1.

Decision established a specific post-accession mechanism whereby the EU has continued to monitor those states' reforms in principle to ensure that they comply with the rule of law standards associated with membership.[90] In that context, the European Commission has established "benchmarks", and issued subsequent regular reports on the states' progress in e.g. bettering their judicial systems in the light of those benchmarks.[91]

Such an unprecedented post-accession monitoring, which has not prevented setbacks in the functioning of e.g. the Romanian judiciary,[92] has been partly overtaken and generalized since.[93] Out of necessity, given the rule of law regression unfolding in several Member States, conditionality mechanisms, periodical Commission assessments through e.g. the Annual Rule of Law Review, and a regular rule of law "dialogue" in the Council, are emulating and supplementing the pre-accession toolbox – and some of its imperfections[94] - in an attempt to secure *continuing* observance of the rule of law within the Union too.[95] The case law of the European Court of Justice has bolstered the apparent feedback effect of the pre-accession rule of law policy, potentially calling for a more systematic pre- and post-accession monitoring. The Member States' duty of "non-regression", which the Court coined in its *Repubblika* ruling,[96] confirms that the respect for the rule of law and the commitment to promote it that are required for a state to join the Union, continue to bind all states qua Member States, as a condition to enjoy all the rights associated with membership.[97]

---

[90] E.g. Commission Decision 2006/928/EC of 13 December 2006 establishing a mechanism for cooperation and verification of progress in Romania to address specific benchmarks in the areas of judicial reform and the fight against corruption (OJ 2006 L 354, p. 56). The Court of Justice found in *Asociaţia 'Forumul Judecătorilor din România'* (Joined Cases C-83/19, C-127/19, C-195/19, C-291/19, C-355/19 and C-397/19, EU:C:2021:393); that the CVM Decision, and the benchmarks it contains "are intended to ensure that Romania complies with the value of the rule of law, set out in Article 2 TEU, and are binding on it" (para 178). The Court also held that those benchmarks "are formulated in clear and precise terms and are not subject to any conditions, and they therefore have direct effect" (paragraphs 249 and 250). See also: Joined Cases C-357/19, C-379/19, C-547/19, C-811/19 and C-840/19, *Euro Box Promotion and Others*, EU:C:2021:1034; Case C-430/21, *RS,* EU:C:2022:99.

[91] See e.g. European Commission, *Report to the European Parliament and the Council on progress in Romania under the cooperation and verification mechanism,* COM (2022) 664.

[92] See in this sense, Case C-430/21, *RS,* EU:C:2022:99.

[93] See Commission's 2022 Report on Romania, op. cit. pp. 1-2.

[94] See e.g. the early critique by Dimitry Kochenov, *EU Enlargement and the Failure of Conditionality* (Kluwer, 2008) cf. Ronald Janse, "Is the European Commission a credible guardian of the values? A revisionist account of the Copenhagen political criteria during the Big Bang enlargement", (2019) 17 *I.CON*, p. 43.

[95] See European Commission, *Rule of Law Report - The rule of law situation in the European Union*, COM(2022) 500 final. More on this innovation, see Didier Reynders, "Respect de l'Etat de droit dans l'Union: outils et perspectives", *Revue de l'Union européenne* No 657, April 2022, p. 201; Renáta Uitz, "The Rule of Law in the EU: crisis, differentiation, conditionality" (2022) 7 *European Papers* p. 929; Petra Bard and Laurent Pech, "The Commission 2021 Rule of Law Report and the EU Monitoring and Enforcement of Article 2 TEU Values" (Report, European Parliament. 21 February 2022). see also Hoxhaj, op. cit.

[96] Case C-896/19 *Repubblika*, EU:C:2021:311. See further Adam Lazowski, *"*Strengthening the rule of law and the EU pre-accession policy: *Repubblika v. Il-Prim Ministru* : case C-896/19" (2022) 59 *Common Market Law Review* p. 1803; Mathieu Leloup, Dimitry Kochenov and Aleksejs Dimitrovs, "Non-regression: opening the door to solving the 'Copenhagen Dilemma'? All the eyes on Case C-896/19 *Repubblika v Il-Prim Ministru*" (2021) *RECONNECT Working Paper* (Leuven) No. 15.

[97] Case C-896/19 *Repubblika*, EU:C:2021:311; Case C-204/21 *Commission v. Poland (Muzzle Law)*, EU:C:2023:442; See also Koen Lenaerts, "The Rule of Law and the constitutional identity of the European

Those institutional and judicial developments give a concrete expression to the consistency the EU Treaties require between the Union's internal and external defence of the rule of law, and specifically between accession conditions and membership obligations. In particular, the duty of "non-regression" further articulates Article 21 TEU's requirement of coherence between the principles founding the Union's existence and development, and those underpinning its external action, including the rule of law, and the interlinkage between their internal (membership) and external (pre-accession) safeguard by the EU. While still abstract at this stage, the operationalization of the duty of non-regression may indeed prompt further elucidation of common rule of law standards, applicable both inside and outside the Union, and bolster their defense.

The on-going elaboration of the internal rule of law toolkit,[98] and the related case law of the European Court of Justice, have in turn inspired further articulation of the rule of law the EU is promoting externally. Starting with the candidate states,[99] the EU enlargement methodology, including the accession negotiations, has (mechanically) incorporated new elements of the evolving EU rule of law acquis, as elaborated by the Court.[100] Its observance is now conceived of as one of the "fundamentals of the accession process".[101] It may then be hoped that such development will generate more consistency and scrupulousness in the overall EU approach to the rule of law. Indeed, despite the well-documented deterioration of the rule of law in Serbia, a candidate for membership, the EU Member States have not fundamentally altered the pace of their accession negotiations with that applicant,[102] while failing to open those negotiations with the Republic of North Macedonia for many years, despite the latter repeatedly fulfilling the preliminary rule of law conditions, as certified by the European Commission.[103] The lingering inconsistency in the application of the pre-accession standards,[104] specifically articulated to uphold the rule of law, which this episode alone illustrates, has impinged on the effectiveness of the principled ever-stricter conditionality, and questions the latter's raison d'être. More dangerously, it has

---

Union" (Sofia, 5 March 2023: https://evropeiskipravenpregled.eu/the-rule-of-law-and-the-constitutional-identity-of-the-european-union/), and contribution to this Special Issue.

[98] See other contributions in this Issue; as well as: Reynders, op. cit., Daniel R. Kelemen, "The European Union's failure to address the autocracy crisis: MacGyver, Rube Goldberg, and Europe's unused tools" (2022) *Journal of European Integration* p. 1.

[99] Damjanovski, Hillion and Preshova, "Uniformity and differentiation in the fundamentals of EU membership", op. cit.

[100] See, in particular, the case law related to the principle of judicial independence, e.g. Case C-64/16, *Associação Sindical dos Juízes Portugueses,* EU:C:2018:117; Case 585/18, *A.K. and others* EU:C:2019:982, Case C-619/18, *Commission v Poland*, EU:C:2019:53; Case C-192/18, *Commission v Poland*, EU:C:2019:924; Case C-791/20, *Commission v Poland*, EU:C:2021:596. For an analysis of this fast.developing case law see, e.g. Laurent Pech and Dimitry Kochenov, *Respect for the Rule of Law in the Case Law of the European Court of Justice: A Casebook Overview of Key Judgments since the Portuguese Judges Case*, Swedish Institute for European Policy Studies, Report 2021:3.

[101] European Commission, *Enhancing the accession process*, op. cit.

[102] See EU Council, *Conclusions on Enlargement and Stabilisation and Association Process*, 13 December 2022 <https://www.consilium.europa.eu/media/60797/st15935-en22.pdf>. The Commission, and particularly the Commissioner in charge of Enlargement, have also been criticised for their leniency: <https://euobserver.com/world/156620>.

[103] <https://euobserver.com/opinion/155491?utm_source=euobs&utm_medium=email>.

[104] Marc Maresceau, "The EU Pre-Accession Strategies: a Political and Legal Analysis", in Marc Maresceau and Erwann Lannon (eds), *The EUs Enlargement and Mediterranean Strategies - A Comparative Analysis* (Palgrave, 2001), p. 3.

relativized the significance of the rule of law both as EU founding value, prerequisite for membership and principle of the EU external action, and in turn diminishes the credibility of the EU to uphold it. That the Union should be more rigorous and consistent in safeguarding the rule of law through its pre-accession conditionality is not only critical in the longer term to ensure post-enlargement continued compliance with its values internally, it is also imperative for the credibility of its external action more generally considering that its overall pre-accession approach has inspired its rule of law promotion further afield, in line with the prescriptions of Article 21(1) TEU.

Foreshadowing the mandate of Article 8 TEU, the EU has indeed employed pre-accession-like instruments in the context of the so-called European Neighbourhood Policy[105] to promote the rule of law, and in particular to spell out priorities for neighbouring countries to reform their judiciary, as prerequisite to deepen their relationship with the Union.[106] The Union has also concluded agreements with some of its neighbours, which have included specific "domestic reforms" provisions, whereby the parties must cooperate with a view to "developing, consolidating and increasing the stability and effectiveness of democratic institutions and the rule of law (…) making further progress on judicial and legal reform, so as to secure the independence, quality and efficiency of the judiciary, the prosecution and law enforcement; strengthening the administrative capacity and guaranteeing the impartiality and effectiveness of law-enforcement bodies; (…) ensuring effectiveness in the fight against corruption".[107]

While the rule of law is still envisaged as the basis of their internal and external policies as required by essential elements clauses, the parties are thus increasingly expected to cooperate in specific rule of law related areas to make that notion a reality, potentially prompting further articulation of common standards, whose observance

---

[105] See e.g. Joint Communication of the European Commission and High Representative, *A new response to a changing neighbourhood*, COM (2011) 303 final, p. 14. Further: Marise Cremona and Niamh Nic Shuibhne "Integration, membership, and the EU neighbourhood" (2022) 59 *Common Market Law Review* (Special Issue), p. 155; Olga Burlyuk and Peter Van Elsuwege, "Exporting the rule of law to the EU's Eastern Neighbourhood: reconciling coherence and differentiation", in Sara Poli (ed.) *The European Neighbourhood Policy – Values and Principles* (Routledge, 2016), p. 167; Narine Ghazaryan, *The European Neighbourhood Policy and the Democratic Values of the EU: A Legal Analysis* (Hart Publishing, 2014); B. Van Vooren, *EU External Relations Law and the European Neighbourhood Policy. A Paradigm for Coherence* (Routledge, 2012); Christophe Hillion, "The EU's Neighbourhood Policy towards Eastern Europe" in Alan Dashwood & Marc Maresceau (eds), *Law and Practice of EU External Relations – Salient Features of a Changing Landscape* (CUP, 2008) p. 309; 20; Marise Cremona and Christophe Hillion, "*L'Union fait la force?* Potential and limits of the European Neighbourhood Policy as an integrated EU foreign and security policy", *European University Institute Law Working Paper* No 39/2006; <cadmus.iue.it/dspace/bitstream/1814/6419/1/LAW-2006-39.pdf>.

[106] Action Plans adopted in the context of the European Neighbourhood Policy can be found here: <https://www.eeas.europa.eu/eeas/enp-action-plans_en>. For a recent articulation of the Rule of law promotion in relation to the EU neighbours, see e.g. European Commission, *Proposal for a Council Decision on the position to be taken on behalf of the European Union in the Association Council established under the Association Agreement between the European Union and the European Atomic Energy Community and their Member States, of the one part, and Georgia, of the other part, on the adoption of the EU-Georgia Association Agenda*, COM (2022) 103.

[107] Article 4 of the Comprehensive and enhanced Partnership Agreement between the European Union and the European Atomic Energy Community and their Member States, of the one part, and the Republic of Armenia, of the other part, *OJ L 23, 26.1.2018, p. 4–466*. The EU-Ukraine Association Agreement (op. cit) contains a similar provision (Article 6: "dialogue and cooperation on domestic reform"), although crafted in softer and vaguer terms.

might in turn lay the grounds for closer links.[108] The EU partners' ambition to deepen their cooperation with the Union, for instance in the field of justice and home affairs, indeed depends on their effective observance of the rule of law.[109] The mutual confidence in the parties' rule of law standards may in turn open the possibility for the relationship to involve mechanisms of deeper cooperation, such as mutual recognition of e.g. the parties' judicial decisions; the EU relationship with close neighbours like Iceland and Norway being a case in point.[110] As will be discussed below, such a mutual confidence then entails that the EU too is trustworthy in terms of its compliance with the rule of law.[111]

2.2.4. Discrepancy between mandate and delivery

The - admittedly highly selective - account of the EU external rule of law toolbox illustrates that, in line with the terms of the Treaty-based mandate discussed above, its promotion is permeating different EU external policies, including the CFSP. Upholding and promoting the rule of law in the EU relations with the wider world takes several forms, involving different types of conditionality, both negative (e.g., potential suspensions of relationship, or direct sanctions in reaction to third states' breaches of the rule of law), and positive (encouraging third states to certain a behaviour through various incentives and/or as a condition to deepen the relationship with the EU, including accession).

The Union's external rule of law promotion has also encompassed a degree of variation, if not scalability, which partly corresponds to the differentiation prescribed by the EU Treaty provisions. A cursory look at various instruments shows several articulations of the rule of law promotion, from very general to very specific. It varies not only in substance, but also in methodology, both in terms of advocacy techniques, progress and compliance monitoring, and sanction in case of regression. General, if not superficial in some essential clauses as if to pay lip service to the EU value promotion mandate, respect for the rule of law becomes a potent and specific precondition if the relations (are to) involve a higher degree of actual or potential integration of third states with the EU legal order. Whether or not the country is a beneficiary of financial support, and/or covered by the EU development policy also determines the terms of the rule of law being promoted, and the way it is promoted.

While the EU rule of law mandate has been set out to encompass a level of graduation in the way it is to be carried out, in consideration of the political covenant

---

[108] E.g. for the purpose of increasing mobility, by way of visa liberalisation, See e.g. Olga Burlyuk and Peter Van Elsuwege, op. cit.

[109] Article 14 of the EU- Ukraine Association Agreement foresees that "In their cooperation on justice, freedom and security, the Parties shall attach particular importance to the consolidation of the rule of law and the reinforcement of institutions at all levels in the areas of administration in general and law enforcement and the administration of justice in particular. Cooperation will, in particular, aim at strengthening the judiciary, improving its efficiency, safeguarding its independence and impartiality, and combating corruption. Respect for human rights and fundamental freedoms will guide all cooperation on justice, freedom and security"

[110] Convention on jurisdiction and the recognition and enforcement of judgments in civil and commercial matters, *OJ L 339, 21.12.2007, p. 3–41*, Agreement between the European Union and the Republic of Iceland and the Kingdom of Norway on the surrender procedure between the Member States of the European Union and Iceland and Norway, *OJ L 292, 21.10.2006, p. 2–19.*

[111] See discussion under section 3.2.3.

underlying the relationship,[112] some of its expressions seemingly depart from the EU Treaties' instructions. Practice displays a degree of instrumentalization of the rule of law, whereby the terms of its promotion are a function of the aims it is set out to achieve in a specific relationship. Various instruments involve the enunciation of articulate standards, promoted through targeted tools and tailored to attain the objectives of the foreign (and security) policy frameworks in which they are embedded. The EU financial instrument (NDICI), and the CFSP agreements with Mauritius/Tanzania typify the phenomenon. While the pre-accession strategy involves a more comprehensive, articulate and systematic projection of rule of law standards, it is functional too, at least partly. Though aimed at entrenching the rule of law as a value in the constitutional fabric of the acceding state, it has long been, perhaps primarily, about ensuring that the candidate is practically able to operate as a Member State in the EU legal order, i.e. to respect the EU acquis.

Moreover, the promotion of the rule of law also appears politicized. Practice indicates that tools used in relation to similar types of partners (e.g., neighbouring states) do differ in the way they are crafted. Alternatively, they may be similarly crafted and embedded in the same policy framework in relation to similar types of countries, but they are applied differently from one country to the other. The diverse handling of rule of law deteriorations in different third states from the same region, including candidate states, which in principle involve the most active and demanding EU rule of law policy, is telling. At the same time, some relationships hardly include any rule of law promotion dimension. Beyond the nature of the links which the EU maintains and intends to develop with a third state, Member States' interests in relation to that state,[113] as well as the latter's aspirations towards the EU, its (geo)political clout, and its receptiveness (or lack thereof) to EU demands, appear to determine the rule of law dimension of the relationship, its function therein, and its application. In sum, some third states are more equal than others before the EU rule of law promotion.

The rule of law has not been approached and promoted *only* as an (independent) founding *value* of the EU and cornerstone of its constitutional order[114] which the Union seeks to advance to the wider world, and particularly towards its vicinity. A siloed, transactional and unsystematic promotion of the rule of law also surfaces, that does not fit neatly with the EU constitutional mandate recalled above, and the imperative of coherence it encompasses,[115] and on which the EU's credibility depends.

The on-going articulation of rule of law standards and monitoring mechanisms within the Union, triggered in part by the internal deterioration in this respect, and in turn by new imperatives of accession preparations, could in the longer run contribute to a more systematized, coherent and thus authoritative external rule of law action too.

---

[112] Further on the notion of political covenant, see Alessandro Petti, *EU Neighbourhood law: Wider Europe and the extended EU's legal space* (Hart, forthcoming).

[113] Vuk Vuksanovic, "France has become Serbia's new best friend in the EU", 12/2/2021, <https://www.euronews.com/my-europe/2021/02/12/france-has-become-serbia-s-new-best-friend-in-the-eu-view>

[114] See e.g. Case C-455/14 P *H* v *Council and Others*, EU:C:2016:569.

[115] Note that, contrary to Article 3(5) TEU, the European Commission's 2022 Trade Policy Review mentions interests before values, see: *An Open, Sustainable and Assertive Trade Policy*, COM (2021) 66 final, p. 4. The same holds true in the Council Press Release "Delivering results by standing firm on EU interests and values" following the EU-China leaders meeting of 2020, op. cit.

The Court of Justice's mention of a Member State's duty of "non-regression", and the notion that respect for the rule of law as EU value is a precondition for them to enjoy the full benefits of membership, might help buttressing the normative significance the Treaties attribute to the rule of law, with potentially positive knock-on effect on its external promotion, notably in terms of Union's authority. That said, the latter also hinges on both institutions and Member States themselves scrupulously *complying with the rule of law in the conduct of the EU external action*. However sophisticated in their design, and consistent in their deployment, tools to promote and uphold the rule of law externally are worthless if the latter and instruments to enforce it internally are (structurally) deficient.

## 3. THE RULE OF LAW AS STRUCTURAL PRINCIPLE OF THE EU EXTERNAL ACTION

As recalled above, Articles 23 TEU and 205 TFEU require that the EU external action of the Union be "conducted in accordance with" the general prescriptions of e.g. Article 21 TEU. Paragraph 3 of the latter provision stipulates that the "Union shall respect the principles and pursue the objectives set out in paragraphs 1 and 2". The rule of law is one of such "principles", while "consolidat[ing] and support[ing]" it is envisaged as one the "objectives" the Union shall "pursue". Read together, those provisions require that the EU external action be conducted in accordance with the rule of law.

Article 21(3) TEU further stipulates that the Union shall respect those principles "in the development and implementation of the different areas of the Union's external action". Such an obligation thus binds not only the Union's institutions (3.1.), but also its Member States, since in the composite EU system of external action, as in many areas of EU law, "implementation" is predominantly the latter's responsibility (3.2.). That EU institutions and Member States should conduct the Union's external action in accordance with the rule of law, and be accountable for it, is indeed essential for the Union's authority to promote and uphold that value in relation to the wider world.

### *3.1. EU institutions' conduct*

EU primary law comprises several provisions which, by design or in effect, help secure that EU institutions respect the rule of law in general, and in the conduct of the Union's external action, in particular.

As mentioned above, the EU institutional framework "shall aim to promote [the Union's] values", including the rule of law.[116] The European Commission plays an important role in this context, in that it shall "ensure the application of the Treaties, and of measures adopted by the institutions pursuant to them [and] oversee the application of Union law under the control of the Court of Justice".[117] It is indeed the Court that ultimately "ensure[s] that in the interpretation and application of th[e]

[116] Article 13(1) TEU.

[117] On the European Commission as "guardian of the Treaties", see e.g. Case C-213/19, *Commission v UK*, EU:C:2022:16; Case C-620/16, *Commission* v *Germany*, EU:C:2019:256.

Treaty the law is observed".[118] In this sense, it has emphasized that "the [Union] is based on the rule of law, inasmuch as neither its Member States nor its institutions can avoid review of the conformity of their acts with the basic constitutional charter".[119]

Based on that general mandate, European judges have been called upon to verify that EU external instruments, both contractual (i.e., EU international agreements) and autonomous (i.e., EU unilateral measures), are adopted in conformity with EU primary law, including relevant EU procedural requirements and the institutional balance they embody,[120] EU fundamental rights as enshrined e.g., in the Charter of Fundamental Rights,[121] and international norms binding the Union.[122]

The Treaty of Lisbon has generally expanded the Court of Justice's jurisdiction, and thus, in principle, the rule of law in the EU. While the reviewability of acts of the European Council is an important development in this respect,[123] the most-eye catching innovation Lisbon introduced in terms of judicial control was the extension, albeit within limits, of the Court's jurisdiction over the CFSP. Where those boundaries of judicial review are eventually set is of central relevance to determine whether the EU external action is conducted in accordance with the rule of law, as required by the general provisions discussed above.

3.1.1. A Constitutional puzzle

Included in the TEU chapter governing the CFSP, Article 24(1) TEU stipulates that: "The Court of Justice of the European Union shall not have jurisdiction with respect to these provisions, with the exception of its jurisdiction to monitor compliance with Article 40 of this Treaty and to review the legality of certain decisions as provided

[118] Article 19 TEU. Also in view of Article 344 TFEU, as interpreted by the Court in e.g. Opinion 2/13 *re: EU Accession to the ECHR (II),* EU:C:2014:2454.

[119] Case C-294/83, *Les Verts*, EU:C:1986:166.

[120] Particularly in the context of the EU treaty-making procedure set out in Article 218 TFEU (see e.g.; Case C-275/20, *Commission v Council (Agreement with Korea),* EU:C:2022:142; Case C-244/17, *Commission* v *Council (Agreement with Kazakhstan)*, EU:C:2018:662; Case C-658/11, *Parliament* v *Council (Agreement with Mauritius)*, EU:C:2014:2025; Case C-130/10, *European Parliament v Council (Smart Sanctions)* ECLI:EU:C:2012:472). Further on the case law relating to the principle of institutional balance in EU external relations, see e.g. Heliskoski, "The procedural law of international agreements: A thematic journey through Article 218 TFEU" (2020) 57 *Common Market Law Review* p. 79; Panos Koutrakos, "Institutional balance and sincere cooperation in treaty-making under EU law" (2019) 68 *International & Comparative Law Quarterly,* p. 1; Christophe Hillion, "Conferral, cooperation and balance in the institutional framework of the EU external action" in Marise Cremona (ed.), *Structural principles in EU external relations law* (Hart, 2018), p. 117.

[121] For instance, the Court has exercised full judicial control over the lawfulness of EU restrictive measures against natural or legal persons to make sure "that they are founded on solid basis", confirming and building upon the case law emerging prior to the Lisbon Treaty (see e.g., Case T-723/20, *Prigozhin*, EU:T:2022:317, and pre-Lisbon: Joined Cases C-593/10 P and C-595/10 P *Commission and Others* v *Kadi*, C-584/10 P, EU:C:2013:518;

[122] See e.g. Case C-266/16, *Western Sahara Campaign UK*, EU:C:2018:118.

[123] A jurisdiction which the Court still has to exercise to its full extent, as suggested by Case T-192/16, *NF* v *European Council*, EU:T:2017:128 and Joined Cases C-208/17 P to C-210/17 P, *NF*, ECLI:EU:C:2018:705. See also Case T-180/20, *Sharpston* v *Council and Conference of the Representatives of the Governments of the Member States,* EU:T:2020:473; and Case C-684/20 P, *Council and Conference of the Representatives of the Governments of the Member States*, EU:C:2021:486.

for by the second paragraph of Article 275 of the Treaty on the Functioning of the European Union."

Reiterating in its first paragraph that the Court has no jurisdiction over the CFSP, Article 275(2) TFEU then foresees that "the Court shall have jurisdiction to monitor compliance with Article 40 of the Treaty on European Union and to rule on proceedings, brought in accordance with the conditions laid down in the fourth paragraph of Article 263 of this Treaty, reviewing the legality of decisions providing for restrictive measures against natural or legal persons adopted by the Council on the basis of Chapter 2 of Title V of the [TEU]."

As "[t]he very existence of effective judicial review designed to ensure compliance with EU law is of the essence of the rule of law",[124] these provisions do create an uncertainty as to whether the external action of the Union can at all be conducted in conformity with it, as otherwise required by the Treaties. On the one hand, the Member States' acknowledgement of the CJEU's jurisdiction over (certain) CFSP decisions indicates that, though traditionally governed by distinct rules and procedures, the CFSP is no longer immune from judicial review at EU level, and that it too is subject to the rule of law in the Union's constitutional order.[125] Such a recognition is indeed congruent with the general mandate of the Court which Article 19 TEU establishes, and gives a concrete institutional expression to the requirements set out in Articles 21 and 23 TEU.

On the other hand, the principle that the Court's jurisdiction remains excluded directly challenges that consistency. The ensuing ambiguity is not only problematic in terms of legal certainty, which incidentally is a component of the rule of law.[126] More significantly, the Treaty formulation of the CFSP-related jurisdiction also introduces a fundamental tension, if not contradiction between, on the one hand, the hardening of the rule of law imperative both as an objective of, and constitutional requirement governing the conduct of the external action of the Union and, on the other hand, an institutional obstruction to its effective observance. That tension compromises the Union's ability to carry out its external rule of law mandate. For how can it credibly promote and uphold the rule of law, and conduct its external action in accordance therewith, which presupposes effective judicial review, if its constitutional charter in principle excludes this review in relation to an entire a policy area, viz. the CFSP, defined by the Treaty as "cover[ing] all areas of foreign policy and all questions relating to the Union's security"?[127] Is it conceivable that, for example, the EU rule of law mission EULEX KOSOVO, whose raison d'être is to assist the authorities of Kosovo to establish a rule of law compliant judicial system and to exercise some limited executive tasks, takes measures which, in principle, cannot be contested before

[124] Case C-64/16, *Associação Sindical dos Juízes Portugueses,* EU:C:2018:117, see also C-72/15, *Rosneft*, EU:C:2017:236, ¶73, Case C-216/18, *LM*, EU:C:2018:586, ¶51.

[125] On the specificity of the CFSP, and its limits see e.g. Geert de Baere, *Constitutional principles of EU external relations* (OUP, 2008); Graham Butler, *Constitutional Limits of the EU's Common Foreign and Security Policy* (University of Copenhagen, 2016); Piet Eeckhout, *Does Europe's Constitution Stop at the Water's Edge? Law and Policy in the EU's External Relations* (Europa law Publishing, 2005).

[126] See European Commission, *A new EU Framework to strengthen the Rule of Law*, Annex I: *The Rule of law as a foundational principle of the Union*, COM(2014) 158.

[127] Article 24(1) TEU.

EU courts on the ground that they are adopted by a CFSP/CSDP-based entity?[128] How can the EU convincingly export standards of judicial protection through CFSP Agreements with e.g. Mauritius or Tanzania, if in principle those very standards are inapplicable to test the legality of such agreements themselves, or the measures taken by the CSDP mission they are deemed to supplement?[129]

In observing that "certain acts adopted in the context of the CFSP fall outside the ambit of judicial review by the Court of Justice", the Court's Opinion 2/13 on the envisaged EU accession to the European Convention of Human Rights (ECHR) was an admission that the EU constitutional order indeed fails to provide effective judicial review in relation to CFSP measures – while by contrast, such review could have taken place in the context of the ECHR but, in the view of the Court of Justice, at the expense of the autonomy of the EU legal order, which rendered the envisaged EU accession incompatible with the EU Treaties.[130] The Court however noted then "that [it] ha[d] not yet had the opportunity to define the extent to which its jurisdiction is limited in CFSP matters as a result of those provisions",[131] thus keeping the possibility through such definition to solve the constitutional puzzle.

To be sure, unless the Court's limited CFSP jurisdiction is construed broadly, and/or unless it accepts that judicial review of CFSP decisions falling outside its jurisdiction is effectively carried out at Member State's level,[132] or at international level,[133] the EU Treaties would themselves prevent the EU external action from being conducted in accordance with the rule of law, while prescribing it at the same time.[134] It would in turn undermine the EU authority to promote the rule of law externally, and thus its capacity to fulfil its mandate in this respect.

3.1.2. Resolving the contradiction in the name of the rule of law

Since its seminal, if contested, Opinion 2/13, the Court of Justice has seemingly attempted to overcome the Treaty-based contradiction.[135] As a starting point, it

[128] On issues raised by this mission, see the analysis by the Venice Commission: https://www.venice.coe.int/webforms/documents/default.aspx?pdffile=CDL-AD(2010)051-e

[129] See discussion under section 2.2. above.

[130] Opinion 2/13 *re: EU Accession to the ECHR (II)* EU:C:2014:2454.

[131] Opinion 2/13, ¶251.

[132] Opinion 1/09 *re: Unified Patent Court* EU:C:2011:123. Further, see e.g. Christophe Hillion, "Decentralised integration? The protection of fundamental rights in EU Common Foreign and Security Policy" (2016) 1 *European Papers* p. 55.

[133] See e.g. Stian Øby Johansen, "Accountability Mechanisms for Human Rights Violations by CSDP Missions: Available and Sufficient?" (2017) 66 *International and Comparative Law Quarterly* p. 181; Frederik Naert, *International Law Aspects of the EU's Security and Defence Policy, with a Particular Focus on the Law of Armed Conflict and Human Rights* (Intersentia, 2010); Christophe Hillion and Ramses Wessel, "The Good, the Bad and the Ugly: Three Levels of Judicial Control over the CFSP" in Steven Blockmans and Panos Koutrakos (eds.), *Research Handbook on EU Common Foreign and Security Policy* (Elgar, 2017) p. 65.

[134] It would also point to another constitutional inconsistency by inhibiting the EU capacity to fulfil its Treaty-based mandate to accede to the ECHR set out in Article 6(2) TEU.

[135] For an analysis of this case law, see among others: Peter van Elsuwege, "Judicial review and the common foreign and security policy: limits to the gap-filling role of the Court of Justice", (2021) 58 *Common Market Law Review* p. 1731; Joni Heliskoski, "Made in Luxembourg: The fabrication of the law on jurisdiction of the Court of Justice of the European Union in the field of the Common Foreign and Security Policy" (2018) 2 *Europe and the World: A Law Review*; "Judicial Review in the EU's Common Foreign and Security Policy", (2018) 67 *ICLQ*, p. 1; Marise Cremona, "Effective judicial review is of the

(rightly) framed the provisions of Article 24(1) TEU and Article 275(2) TFEU as a *derogation* from "the rule of general jurisdiction which Article 19 TEU confers on the Court to ensure that in the interpretation and application of the Treaties the law is observed and they *must, therefore, be interpreted narrowly*" (emphasis added).[136] This general proposition subsequently framed the Court's interpretation of the different aspects of its jurisdiction over the CFSP.

First, the Court has considered that CFSP acts whose application interacted with other EU law rules would remain within its general jurisdiction. The exclusion enshrined in Article 24(1) TEU and Article 275(2) TFEU "cannot be considered to be so extensive as to exclude the Court's jurisdiction to interpret and apply the provisions of the Financial Regulation with regard to public procurement" applicable in the context of a CSDP Mission – in casu EULEX KOSOVO.[137] Nor can it "be considered to be so extensive as to exclude the jurisdiction of the EU judicature to review acts of staff management [in the context of CSDP operation] relating to staff members seconded by the Member States the purpose of which is to meet the needs of that mission at theatre level, when the EU judicature has, in any event, jurisdiction to review such acts where they concern staff members seconded by the EU institutions".[138]

The CFSP context within which other EU substantive rules apply does not, therefore, have the effect of de-activating the general jurisdiction which the Court exercises in relation to the latter. The same holds true whenever EU (non-CFSP) procedural rules are involved. Thus, the Court found that the negotiation and conclusion of CFSP agreements on the basis of Article 218 TFEU would be subject to its general control. In the *Mauritius* case for instance, concerning the CFSP agreement discussed above, the Court held that "it cannot be argued that the scope of the limitation, by way of derogation, on the Court's jurisdiction envisaged in (…) Article 24(1) TEU and in Article 275 TFEU goes so far as to preclude [it] from having jurisdiction to interpret and apply a provision such as Article 218 TFEU which does not fall within the CFSP, even though it lays down the procedure on the basis of which an act falling within the CFSP has been adopted".[139]

Second, the Court of Justice has seemingly conceived of the CFSP derogatory judicial regime as an exclusion of certain CFSP acts from its review - exclusion which itself ought to be understood restrictively - but not as a limitation of available legal remedies for that purpose. Referring to the "complete system of legal remedies and procedures designed to ensure judicial review of the legality of [EU] acts", the Court found that the legality control envisaged in Article 275(2) of CFSP acts establishing restrictive measures, would not be limited to annulment proceedings under Article

essence of the rule of law: Challenging Common Foreign and Security Policy measures before the Court of Justice" (2017) 2 *European Papers* p. 671; Sara Poli, "The Common Foreign and Security Policy after Rosneft: Still imperfect but gradually subject to the rule of law", (2017); 54 *Common Market Law Review* p. 1799; Graham Butler, "The Coming of Age of the Court's Jurisdiction in the Common and Foreign and Security Policy", (2017) 13 *EuConst* p. 673.

[136] See Case C-658/11, *Parliament* v *Council (Mauritius)*, EU:C:2014:2025.

[137] Case C-439/13P, *Elitaliana* v *Eulex Kosovo*, EU:C:2015:753.

[138] Case C-455/14P, *H* v *Council and Others*, EU:C:2016:569.

[139] Case C-658/11, *Parliament* v *Council (Mauritius)*, EU:C:2014:2025, ¶73.

263(4) TFEU, but would also encompass the validity control through the preliminary ruling procedure:

> Since the purpose of the procedure that enables the Court to give preliminary rulings is to ensure that in the interpretation and application of the Treaties the law is observed, in accordance with the duty assigned to the Court under Article 19(1) TEU, it would be contrary to the objectives of that provision and to the principle of effective judicial protection to adopt a strict interpretation of the jurisdiction conferred on the Court by the second paragraph of Article 275 TFEU, to which reference is made by Article 24(1) TEU.[140]

In the same perspective, the European judges held that "the principle of effective judicial protection of persons or entities subject to restrictive measures requires, in order for such protection to be complete, that the Court of Justice of the European Union be able to rule on an action for damages brought by such persons or entities seeking damages for the harm caused by the restrictive measures taken in CFSP Decisions."[141]

In its rulings, the Court of Justice has defined its CFSP-related judicial control in a purposive manner. It has explicitly referred to the rule of law imperative as an EU founding value (invoking Article 2 TEU), that presupposes effective judicial protection (mentioning Article 47 of the Charter of Fundamental Rights as further support) and which the Court, in view of its own role in the EU institutional framework (Article 19 TEU), must secure as far as possible, also in consideration of the constitutional requirements that constrain the conduct of the EU external action (referring to Articles 21 and 23 TEU).

While it has established that it could provide preliminary rulings concerning the *validity* of certain CFSP measures in view of the "duty assigned to [it] under Article 19(1) TEU",[142] the Court further suggests that, if implicitly permitted, it is also willing to perform its *interpretative* function in relation to CFSP acts. Hence, it did provide an interpretation of the founding CFSP Joint Action that established EULEX KOSOVO when asked by a national court, in the context of the preliminary ruling procedure of Article 267 TFEU. Since the parties involved had not questioned the admissibility of the request considering its limited jurisdiction over CFSP acts, the Court did not either, although it could have done so of its own motion,[143] as the Advocate General did in his Opinion.[144] The ruling thereby extended what the Court had already acknowledged in *Rosneft*,[145] namely that it could already exercise its

[140] Case C-72/15, *Rosneft*, EU:C:2017:236, ¶75.

[141] Case C-134/19 P, *Bank Refah Kargaran v. Council and Commission*, EU:C:2020:793, ¶43.

[142] Case C-72/15, *Rosneft*, ¶75.

[143] Case C-439/13 P, *Elitaliana* v *Eulex Kosovo*, EU:C:2015:753; Case C-134/19 P, *Bank Refah Kargaran* v *Council*, EU:C:2020:793.

[144] Case C-283/20, *CO v Commission, EEAS, Council and EULEX KOSOVO,* EU:C:2022:126.

[145] See *Rosneft*, ¶¶62-63. In pending case C-351/22, the Court of Justice has been asked again to provide a preliminary ruling on the interpretation of Decision 2014/512/CFSP concerning restrictive measures in view of Russia's actions destabilising the situation in Ukraine.

interpretative functions in the context of its CFSP-related jurisdiction,[146] for the purpose of monitoring compliance with Article 40 TEU.[147]

Third, and in connection to the previous point, the Court of Justice has articulated a broad conception of *standing* under Article 263(4) TFEU as applicable in the context of Article 275(2) TFEU. A significant development in this regard is the recognition that third states may, qua "legal persons", challenge the legality of CFSP acts that are covered by the latter provision. The Court thus allowed Venezuela to contest the legality of restrictive measures which, as mentioned above, the EU had adopted in reaction to the Venezuelan authorities' assaults on the rule of law.[148] As in earlier cases, the EU judicature invoked Articles 2, 21 and 23 TFEU and interpreted "the fourth paragraph of Article 263 TFEU in the light of the principles of effective judicial review and the rule of law". It found that "a third State should have standing to bring proceedings, as a 'legal person', within the meaning of the fourth paragraph of Article 263 TFEU, where the other conditions laid down in that provision are satisfied",[149] e.g. "direct and individual concern". The Court also underscored that the "obligations of the European Union to ensure respect for the rule of law cannot in any way be made subject to a condition of reciprocity as regards relations between the European Union and third States".[150]

This brief account of the case law suggests that the Court of the Justice has been construing the different terms of its CFSP-related judicial control in ways to meet the requirements of Articles 2, 21 and 23 TEU. Given that "[t]he very existence of effective judicial review designed to ensure compliance with provisions of EU law is inherent in the existence of the rule of law",[151] the Court has progressively been extending to the CFSP terrain the operation of the complete system of legal remedies developed in the pre-Lisbon Community context. To that effect, and to preserve the "coherence of the system of judicial protection provided for by EU law", it has been willing to address what it has occasionally characterized as a "lacuna in the judicial protection of the natural or legal persons concerned",[152] thus emulating the gap-filling function it has performed before in e.g. *Les Verts*, in the name of the rule of law.[153] As will be discussed later, the Court of Justice may have indeed opened an important

[146] The interpretative function of the Court in relation to the CFSP is also necessary, and indeed exercised in cases of conflict of legal basis more generally: See e.g. Cases C-130/10, *European Parliament v Council* (*Smart sanctions)*, Case C-244/17, *Commission* v *Council (Agreement with Kazakhstan)*, EU:C:2018:662. The Court has equally interpreted Treaty provisions concerning the CFSP in sanction cases, see e.g. Case T-125/22, *RT,* in which the General Court of the EU provided an elaborate interpretation of e.g. Article 29 TEU (¶49).

[147] Further on the Court interpretative functions in relation to the CFSP, see e.g., Christophe Hillion, "A Powerless Court? The European Court of Justice and the EU Common Foreign and Security Policy" in Marise Cremona and Anne Thies (eds), *The European Court of Justice and External Relations Law - Constitutional Challenges* (Hart, 2014) p. 47.

[148] See discussion in section 2.2.1., above.

[149] Case C-872/19P, *Venezuela v Council,* EU:C:2021:507, ¶50.

[150] *Venezuela v Council,* ¶52.

[151] Case C-455/14 P, *H* v *Council and Others*, EU:C:2016:569, ¶41.

[152] *Bank Refah Kargaran*, ¶39.

[153] Case C-294/83, *Les Verts*, EU:C:1986:166, ¶23.

route to increase the EU's accountability towards third states,[154] which is an essential component of a rule-of-law-compliant external action.

The Court thus appears incrementally to address the CFSP-specific concerns it had itself flagged in its Opinion 2/13 as obstacle to the EU accession to the ECHR. More generally, the case law partly helps overcome the tension inherent in the Treaty provisions, and contributes to ensuring that the EU external action is indeed conducted in accordance with the rule of law.

Cases are pending that will provide the Court with opportunities to develop that jurisprudence further.[155] One remaining interrogation concerns the notion of "decisions providing for restrictive measures against natural or legal persons" mentioned of Article 275(2) TFEU, and thus the question of what acts fall outside the Court's CFSP-related jurisdiction. As recalled above, the case law has already made clear that certain CFSP acts are not covered by the Court's derogatory jurisdiction wherever they relate to other aspects of EU law which as a consequence brings them within the Court's general jurisdiction. What remains unclear therefore is the category of acts to which the Court drew attention in its Opinion 2/13 that are covered neither by its general jurisdiction, nor by the derogatory regime established by Article 275(2) TFEU.

The notion of "decisions providing for restrictive measures against natural or legal persons" for the purpose of Article 275(2) TFEU remains ambiguous. Oddly, the expression "restrictive measures" as CFSP acts over which the Court has jurisdiction does not feature in the TEU CFSP chapter itself. It only appears in Article 215(2) TFEU (and Article 275(2) TFEU) which is the legal basis for the adoption of *non-CFSP* economic and financial restrictive measures implementing the initial CFSP "decision", and thus measures that are covered by the general jurisdiction of the Court of Justice.[156] While some CFSP "decisions" having restrictive effect may lead to the adoption of subsequent Article 215(2) measures, not all such CFSP "decisions" do, and it is the whole purpose of Article 275(2) TFEU to allow the Court to review the latter's legality.

CFSP "decisions providing for restrictive measures against natural or legal persons" are generally enacted on the basis of Article 29 TEU, according to which "[t]he Council shall adopt decisions which shall define the approach of the Union to a particular matter of a geographical or thematic nature".[157] This is a broadly defined power, which leaves the Council with a wide discretion as to the form and substance of such decisions. Practice indeed shows that the restrictive element of such decisions for natural or legal persons may vary considerably, and may evolve in consideration of the particular circumstances in which those decisions are enacted and ensuing needs they are designed to fulfil. The recent EU instruments adopted in reaction to the Russian aggression against Ukraine, for instance the temporary prohibition of

[154] See Section 3.2.3., below.

[155] E.g. Case C–29/22, *KS & KD v. Council & Ors*., which is an appeal of GC decision in Case T–771/20, *KS & KD v. Council & Ors*., EU:T:2021:798.

[156] *Rosneft*, ¶106.

[157] See General Secretariat of the Council, *Sanctions Guidelines – update*, 4 May 2018, op. cit, pt. 7.

broadcasting activities of certain Russia media outlets, are cases in point.[158] So were the then novel EU measures at hand in the *Kadi* saga, adopted in the wake of the 9/11 attacks.[159] The notion of CFSP decisions for the purpose of Article 275(2) TFEU cannot therefore be interpreted restrictively, by reference to "traditional" restrictive measures. A narrow interpretation would ossify the Court's CFSP control and make it unfit for purpose. It would indeed depart from its past willingness to adapt its judicial control to developments of new EU restrictive practices, by reference to the notion that the Union is "a community based on the rule of law".[160]

Moreover, there is no indication that the Court' jurisdiction under Article 275(2) TFEU should be limited only to CFSP decisions adopted on the basis of Article 29 TEU. It would otherwise mean that measures adopted in the context a CFSP mission based on a Council decision, which are restrictive in terms of individuals rights, e.g. physical interceptions of individuals abroad and subsequent transfer to a third states' authorities for prosecution, as in the context of the *Atalanta* mission evoked above,[161] would fall outside the Court's review. Such a difference of treatment regarding access to EU legal protection based on the legal basis of the CFSP act finds no basis in the Treaty. It would also be paradoxical, and problematic in terms of "the necessary coherence of the system of protection provided for by EU law",[162] as it would entail that CFSP measures that are potentially the most restrictive in terms of individual rights and freedoms, would escape the Court's control.[163]

A narrow understanding of the notion of CFSP "decisions" for the purpose of Article 275(2) TFEU could indeed tempt the EU Council to craft certain CFSP acts, or establish entities adopting such acts, that restrict individuals' rights and freedoms, in a way that shields those acts from judicial review under Article 275(2) TFEU. Such an approach would sit uncomfortably with the very rationale behind the Court's CFSP-

---

[158] See, in particular Council Decision (CFSP) 2022/351 amending Decision 2014/512/CFSP concerning restrictive measures in view of Russia's actions destabilising the situation in Ukraine, *OJ L 60, 2.3.2022 p. 5* and Council Regulation (EU) 2022/350 of 1 March 2022 amending Regulation (EU) No 833/2014 concerning restrictive measures in view of Russia's actions destabilising the situation in Ukraine *OJ L 65, 2.3.2022, p. 1*. And the subsequent decision of the General Court of the EU about the legality of those measures in Case T-125/22, *RT v France*, EU:T:2022:483 – which has been appealed: Case C-620/22 *RT France v Council* (pending), and challenged again, in an action brought on 29 March 2023: Case T-169/23, *RT France v Council*. A detailed list of EU restrictive measures in the context of the Russian invasion of Ukraine is available here: <https://finance.ec.europa.eu/eu-and-world/sanctions-restrictive-measures/sanctions-adopted-following-russias-military-aggression-against-ukraine_en>. For an analysis of those measures, see Frank Hoffmeister, "Strategic Autonomy", op. cit.

[159] Joined Cases C-402/05 P and C-415/05 P, *Kadi v Council*, EU:C:2008:461.

[160] *Kadi*, ¶316, see also ¶¶81 and 281.

[161] See Article 2(d), Council Joint Action 2008/851/CFSP of 10 November 2008 on a European Union military operation to contribute to the deterrence, prevention and repression of acts of piracy and armed robbery off the Somali coast, op. cit. see also Council Decision (CFSP) 2020/2188 of 22 December 2020 amending Joint Action 2008/851/CFSP on a European Union military operation to contribute to the deterrence, prevention and repression of acts of piracy and armed robbery off the Somali coast, *OJ L 435, 23.12.2020, p. 74–78.*

[162] *Bank Refah Kargaran*, ¶39; *Rosneft*, ¶78.

[163] Recall that in Joined Cases, C-478/11 P to C-482/11 P*, Gbagbo and Others v Council*, EU:C:2013:258, ¶57, the Court of Justice underlined that "as regards measures adopted on the basis of provisions relating to the Common Foreign and Security Policy (…) it is the individual nature of those measures which, in accordance with the second paragraph of Article 275 TFEU and the fourth paragraph of Article 263 TFEU, *permits access to the Courts of the European Union*" (emphasis added).

related jurisdiction the latter provision introduced, in addition to the control the Court can otherwise exercise over measures based on Article 215 TFEU, namely to secure effective judicial protection and the rule of law in relation to those CFSP measures that restrict legal and natural persons' rights.

The Court of Justice's ruling in the CFSP-related *SatCen* case may provide support for a purposive and more rule-of-law-friendly conception of the type of CFSP acts the Court may review under Article 275(2) TFEU.[164] The Court thus found that:

> The objective of an action for annulment is to ensure observance of the law in the interpretation and application of the FEU Treaty and it would therefore be inconsistent with that objective to interpret the conditions under which the action is admissible so restrictively as to limit the availability of this procedure merely to the categories of measures referred to by Article 288 TFEU (...)
>
> Therefore, all *acts adopted by the institutions, bodies, offices or agencies of the European Union, whatever their nature or form, which are intended to produce binding legal effects such as to affect the applicant's interests by bringing about a distinct change in his or her legal position, may be the subject of an action for annulment* (emphasis added).

Different types of CFSP measures, whether adopted on the basis of Article 29 TEU or not, whether enacted by the Council or by a body empowered by a Council CFSP act, may "affect the (…) interests" [of a natural or legal person] by bringing about a distinct change in his or her legal positions".[165] It is thus the demonstration of these effects on a (natural or legal) person's interests, that should determine whether such CFSP measures fall within the scope of the Court's judicial control under Article 275(2) TFEU or not, rather than their formal belonging to a predetermined category of CFSP measures which that provision does not specify. This approach, which follows the established case law of the Court of Justice regarding Article 263(4) TFEU to which Article 275(2) TFEU refers, would correspond to the Treaty-based rule of law requirements, the imperatives of effective judicial protection and the "coherence of the system of judicial protection provided for by EU law",[166] which has thus far underpinned the Court CFSP-related jurisdiction.[167]

3.1.3 The jury's still out

In sum, the Treaty of Lisbon endeavoured to strengthen the rule of law in the development and implementation of the EU external action, notably by extending the jurisdiction of the European Court of Justice over the latter. The ambiguous terms of the extension however lay bare an inconsistency in the Treaty-makers' intention regarding the significance the rule of law is to play in the EU relation towards the wider world. The fundamental tension they have introduced in the EU constitutional

---

[164] Case C-14/19 P, *SatCen*, EU:C:2020:492.

[165] In *Venezuela*, the Court talked about acts of the EU that adversely affect a person or entity's rights or interests, see Case C-872/19 P, *Venezuela*, EU:C:2021:507, ¶50.

[166] *Bank Refah Kargaran*, ¶39; *Rosneft*, ¶78.

[167] This approach should also apply beyond the context of CFSP, and in particular in relation to such acts like the one at issue in Case T-192/16, *NF* v *European Council*, EU:T:2017:128 and Joined Cases C-208/17 P to C-210/17P, *NF*, EU:C:2018:705.

charter indeed taints the authenticity of the EU (external) mandate. The Court's case law has articulated ways partly to overcome the conundrum, thus engraining the rule of law as modus operandi of the EU external action, as generally required by the EU Treaties including in its CFSP dimension. The case law in turn contributes to preserving the credibility of the EU in promoting and upholding the rule of law abroad,[168] hence partly compensating for some of the policy incoherencies which have impaired its authority, as suggested in the first part of this discussion.

This case law has occasionally been criticized. In particular, it has been recalled that the Court is equally bound by the principle of institutional balance enshrined in Article 13(2) TEU, [169] which it indeed has the task to guarantee, including in relation to itself, and particularly when exercising its gap-filling function.[170] The Court cannot be seen to circumvent the rule established by Article 275(2) TFEU, however ambiguous, or indeed empty it from its substance without raising a rule of law issue. Yet, the Court cannot be seen to adopt a narrow view of the instruction it has been given under Article 19 TEU either. The latter instruction must be considered both in itself, as well as in conjunction with the general tasks of the EU institutional framework (as per Article 13(1) TEU), to which the Court belongs, and in turn with the mandate of the Union in relation to the wider world, as stipulated in e.g. Article 21 TEU.

On that basis, and in view of the strategic importance of the EU defence of the rule of law on the international plane, it is arguably the task of the Court of Justice to circumscribe, as much as possible, the rule of lawlessness encapsulated in the provisions of Article 24(1) TEU and Article 275(1) TFEU, and to secure that the principles of the EU external action are effectively observed in the CFSP area too, as mandated by e.g. Article 23 TEU. It is indeed the duty of the Court to practice sincere cooperation with other institutions, as instructed by Article 13(2) TEU, to ensure that the Union fulfils its tasks, and that it does so coherently, in line with the prescriptions of Articles 13(1) TEU and 21(3) TEU. This arguably includes the duty to find ways to permit the EU to accede to the ECHR as instructed by Article 6(2) TEU, which the case law arguably may now facilitate. Preventing lawlessness in the Union's conduct of its external action is all the more imperative considering that the Court is otherwise actively engaging to secure that the rule of law is applied by Member States,[171] which is another prerequisite for the EU to fulfil its external rule of law mandate.

---

[168] Though the Court's decision in Joined Cases C-208/17 P to C-210/17 P *NF*, EU:C:2018:705 reveals the limits of its ability and willingness to limit the rule of lawlessness in the EU constitutional order.

[169] See AG Wahl opinion in *H v Council* (Case C-455/14 P, EU:C:2016:212) who otherwise suggested at paragraph 49 of his opinion that "[w]hether such a system is compatible with the principle that the EU is founded on the rule of law is, in the context of the present proceedings, of no relevance. That system is, in fact, the result of a conscious choice made by the drafters of the Treaties, which decided not to grant the CJEU general and absolute jurisdiction over the whole of the EU Treaties. The Court may not, accordingly, interpret the rules set out in the Treaties to widen its jurisdiction beyond the letter of those rules or to create new remedies not provided therein".

[170] See Peter Van Elsuwege, "Judicial review and the Common Foreign and Security Policy: Limits to the gap-filling role of the Court of Justice", (2021) 58 *Common Market Law Review* p. 1731.

[171] Joseph Weiler, "Epilogue: Living in a Glass House: Europe, Democracy and the Rule of Law" in Closa & Kochenov (Eds.), *Reinforcing Rule of Law Oversight in the European Union*, op. cit., p. 313.

*3.2. Member States' conduct*

A rule of law–compliant EU external action requires not only that Union's institutions respect it when developing and implementing all EU external policies, under the control of the Court of Justice. It also presupposes equivalent observance by the Member States. In law and in fact, the EU cannot conduct its external action in accordance with the rule of law if its Member States do not observe it too.

Being a composite structure, the EU depends on its Member States' authorities to implement its external policies, and thus to fulfil its international commitments. This is the case even in areas where the EU enjoys exclusive competence. While the Union alone commits itself towards the wider world in such areas, and in principle assumes sole responsibility to fulfil its ensuing obligations, it is nevertheless reliant on national administrations to meet these commitments, e.g. Member States' customs authorities to implement if the EU external trade policy. The Union is dependent on its Member States' courts as EU courts,[172] effectively to protect within the EU legal order the rights which EU external agreements may generate for third country nationals. In short, the Treaty-based obligation whereby the Union shall conduct its external action in accordance with the rule of law equally binds the Member States.

To be sure, the EU external defence of the rule of law, discussed earlier, would be self-defeating if Member States could depart from it at will. Legally, they are bound to act in coherence with the EU external mandate they themselves established as EU primary-law-makers. Not only must they comply with obligations deriving from EU (external relations) law in general, but that they must also act in ways that facilitate the fulfilment of EU objectives and tasks, in line with their obligation of sincere cooperation.[173] Whether implementing EU (external) measures, or acting in areas where the Union itself has not (yet) acted, and even in areas where it has no competence to act, Member States' respect for the rule of law or lack thereof, determines the Union's own authority in that regard, its capacity to fulfil its Treaty-based mandate, and its ability to function as a legal order.[174] Whether in the context of EU law or outside it, Member States' conduct cannot be entirely detached from the fact that they are part of the Union. In the eyes of the wider world, they always *are* the EU. Their behaviour thus affects, positively or negatively, the credibility and reputation of the Union they constitute.[175]

From this general perspective, any deterioration of the rule of law in a Member State damages the EU's external action as a whole. While undermining its authority to advocate the rule of law on the international level and to influence developments abroad, such a deterioration also practically hampers the Union's aptitude to preserve the rights of third states and their nationals, and so to fulfil its international obligations, in effect impeding its capacity to act as subject of international law in line with the latter's fundamental principles.[176] The ensuing harm to the EU's trustworthiness may

[172] Case C-64/16, *Associação Sindical dos Juízes Portugueses,* EU:C:2018:117, ¶32, Opinion 1/09, *Unified Patent Court*, EU:C:2011:123.

[173] Article 4(3) TEU.

[174] See Opinion 2/13, *re: EU Accession to the ECHR (II)*, EU:C:2014:2454.

[175] Case C-620/16, *Commission v Germany (COTIF)*, EU:C:2019:256.

[176] Case C-66/18, *Commission v Hungary* (*Lex CEU)*, EU:C:2020:792.

diminish the eagerness of its partners to commit themselves towards the Union, in turn crippling the latter's ability to pursue its objectives on the global stage, which relies on multilateral cooperation and partnerships (as per Article 21 TEU), and to exercise the external competences that Member States have conferred upon it to that effect. Incidentally, a Member State's breach of the rule of law potentially affects other Member States' rights under EU external agreements, and their own position in relation to the wider world. They too may suffer the consequences of the misconduct of one of their peers, as they may equally be impacted by third states' countervailing measures against the EU, but also in terms of their own international reputation.

In sum, without respect for the rule of law by *all* Member States, the EU becomes dysfunctional internally,[177] and distrusted and thus handicapped internationally. Their consistent observance of the rule of law is therefore a prerequisite for the EU to fulfil its own overarching mandate in this regard and, in particular, to *conduct* its external action in line with the rule of law. Such a dependency reinforces the normative basis for the EU actively to safeguard the rule of law at the national level too.

3.2.1. Member State's obligations to respect the rule of law

The Treaties include several iterations of Member States' obligation to respect the rule of law, which have relevance for the EU external action in general, and for its complex external rule of law mandate in particular.

Fundamentally, respect for the rule of law is a condition for a state to *become*, and to *remain* a full-fledge Member State of the EU. Article 49 TEU, as discussed above,[178] and Article 7 TEU make it clear that Union membership is contingent on a state's continued respect for, and promotion of, the values enshrined in Article 2 TEU, including the rule of law. The Court of Justice further articulated the terms of that quid pro quo in the following way: "the European Union is composed of States which have freely and voluntarily committed themselves to the common values referred to in Article 2 TEU, which respect those values and which undertake to promote them", adding that "*compliance by a Member State with th*[ose] *values* […] *is a condition for the enjoyment of all of the rights deriving from the application of the Treaties to that Member State"* (emphasis added).[179]

As a particular "application of the Treaties", the external action of the EU engenders rights for the Member States (in terms of e.g. trade and economic opportunities and rights in the wider world), which they enjoy thanks to their EU membership.[180] The benefit of those rights then presupposes for each Member State that it fulfils a twofold obligation associated with membership, as regard EU values in

[177] See e.g. European Commission, *Strengthening the rule of law within the Union A blueprint for action*, COM(2019) 343.

[178] See section 2.1.

[179] Case C-896/19, *Repubblika*, EU:C:2021:311, para 63; Case C-791/19, *Commission* v *Poland (Disciplinary regime for judges)*, EU:C:2021:596; Joined Cases C-357/19, C-379/19, C-547/19, C-811/19 and C-840/19, *SC Euro Box Promotion,* EU:C:2021:1034, Case C-156/21, *Hungary v Parliament and Council*, EU:C:2022:97, ¶126.

[180] As typified by the consequences of Brexit for the United Kingdom: https://commonslibrary.parliament.uk/research-briefings/cbp-9314/

general and the rule of law in particular: an obligation of result (respect),[181] as well as an obligation of conduct (promote). This dual duty finds a specific expression in Articles 21 and 23 TEU, and Article 205 TFEU.

Member States' adherence to the terms of the basic social contract encapsulated in their EU membership[182] is not only essential to ensure their (and their citizens') equality before Union law.[183] It is also of significance for the wider world, and in particular for the EU's partners. Presumably, they interact with the EU with the expectation that any agreement they conclude with it will be effectively implemented in line with the principles of international law, and thus on the assumption that the Member States that compose the Union, on the basis of the above conditions for membership, will comply with ensuing obligations. To be sure, the EU may not rely on the provisions of its internal law, including that of its Member States, as justification for failure to comply with its international commitments.[184]

What the Union is, the principles that underpin its existence and membership, which it otherwise advocates externally, and its ability to defend them,[185] are arguably among the elements that third states also take account of when negotiating with and committing themselves towards the EU (and its Member States). These elements are constitutive of the Union's identity on the international plane;[186] they determine its reliability as a legal order and trustworthiness as subject of international law, in terms of its ability to secure full compliance with its commitments, including through effective legal protection against internal breaches thereof. It is indeed on the assumption that any new Member State does meet the Union's membership requirements, that third states consent to the extension of the geographical scope of application of their agreements with the EU, following the latter's enlargement to that state. They assume that, being accepted by its peers means that the new Member State fulfilled the accession criteria, that it will fully comply with EU law, including its external agreements, and that the Union will appropriately react in case it does not.[187]

Proscribed so as to preserve the integrity of the EU constitutional order,[188] any reduction in the protection of the rule of law in/by a Member State has negative implications not only for the Union and other Member States.[189] It may equally upset the internal implementation of EU agreements and thus affects the external action of

---

[181] Case 157/21, *Poland v Council and Parliament,* EU:C:2022:98, ¶169.

[182] As recalled in Case C-896/19, *Repubblika*, EU:C:2021:311.

[183] Article 4(2) TEU, see further: Koen Lenaerts, "No Member State is More Equal than Others: The Primacy of EU law and the Principle of the Equality of the Member States before the Treaties*", VerfBlog,* 2020/10/08, <https://verfassungsblog.de/no-member-state-is-more-equal-than-others/>; Lucia Rossi, "The Principle of Equality Among Member States of the European Union" in Lucia Rossi and Federico Casolari (eds), *The Principle of Equality in EU Law* (Springer, 2017), p. 3.

[184] Case C-66/18, *Commission v Hungary (Lex CEU),* EU:C:2020:792.

[185] See C*ase* C-156/21, *Hungary v Parliament and* Council, EU:C:2022:97, ¶127; and Case C-157/21, *Poland v Parliament and Council*, EU:C:2022:98, ¶145.

[186] Ibid.

[187] All the more so since, as discussed in section 2, the treaty provisions and the ensuing practice involve normatively and practically stronger rule-of-law-promotion mechanisms in relation to the neighbourhood and, more specifically in the enlargement policy.

[188] C-896/19, *Repubblika*, EU:C:2021:311. See discussion in Section 2.2. above.

[189] Koen Lenaerts, "The Rule of Law and the constitutional identity of the European Union", op. cit., see also Lenaerts' contribution to this Special Issue.

the Union too. EU partners therefore have an equivalent interest in the EU preventing and, if need be, addressing any such regression so as to protect their own rights and those of their nationals in relation to the EU. A lack of action to that effect on the Union's side would risk jeopardizing not only its external relationships, but also its global reputation, more generally. If the regression concerns a new(er) Member State more specifically, affected EU partners could indeed be led to reconsider their acceptance of the new Member's inclusion within the scope of their agreement(s) with the EU, while becoming more circumspect when asked to endorse the implications of future enlargements of the Union.[190]

While a precondition to enjoy all the benefits of membership, including those deriving from the EU external action, Member States' obligation to respect the rule of law also finds specific expressions in the latter context. One such expression is Article 216(2) TFEU which foresees that agreements concluded by the EU are binding on Member States and EU institutions. EU external agreements form "an integral part of EU law",[191] so that situations falling within their scope are, in principle, "situations governed by EU law".[192] Member States must therefore comply with the obligations deriving from all EU external agreements as a matter of EU law,[193] the way they otherwise do in relation to EU primary law, or regulations, directives and decisions, in line with Article 288 TFEU,[194] and in accordance with the principle of primacy of EU law, more generally.[195]

To paraphrase the Court's dictum in *ASJP*, the provision of Article 216(2) TFEU (as that of Article 288 TFEU) arguably "gives concrete expression to the value of the rule of law stated in Article 2 TEU",[196] and to the deriving principles of the EU external action enshrined in Article 21 TEU, mainstreamed through the provisions of Articles 23 TEU and 205 TFEU. Member States' compliance with EU external agreements is indispensable for the Union itself to fulfil its international obligations, including the basic principle of pacta sunt servanda, and thus to ensure that its external action is conducted in accordance with the rule of law.

In particular, national authorities, including courts, must ensure that EU external agreements are implemented, and that rights which stem directly therefrom (and more generally from the EU constitutional order, such as fundamental rights) are effectively

---

[190] Third states may thereby influence the enlargement of the EU: if they consider that a candidate state does not meet the basic requirement of membership, they could oppose its inclusion in the agreement they have with the EU. This is particularly true for parties to agreements like the EEA which contains an elaborate accession procedure (viz. Article 128 EEA).

[191] Case 181/73, *Haegeman*, EU:C:1974:41, ¶¶ 5 and 6, Case C-366/10, *Air Transport Association of America and Others*, EU:C:2011:864, and Opinion 1/17, *re: EU-Canada CET Agreement*, EU:C:2019:341, ¶117,

[192] Opinion 1/17, *re: EU-Canada CET Agreement*, EU:C:2019:341 ; Case C-897/19, *Ruska Federacija v IN,* EU:C:2020:262.

[193] Case 181/73, *Haegeman*, EU:C:1974:41, Case 13/00, *Commission v Ireland*, EU:C:2002:184.

[194] Koen Lenaerts, 'Droit international et monisme de l'ordre juridique de l'Union', *Revue de la Faculté de droit de l'Université de Liège*, No 4, Larcier, Brussels, 2010, pp. 505 to 519.

[195] See e.g. Case C-430/21, *RS,* EU:C:2022:99; Case C-817/19, *Ligue des Droits Humains*, EU:C:2022:491; Joined Cases C-357/19, C-379/19, C-547/19, C-811/19 and C-840/19, *PM and others*, EU:C:2021:1034; see also Case C-284/16, *Achmea*, EU:C:2018:158, ¶34.

[196] In that sense, see: Case C-156/21, *Hungary v Parliament and Council*, EU:C:2022:97, ¶232; Case C-64/16, *Associação Sindical dos Juízes Portugueses,* EU:C:2018:117, ¶ 32.

protected, if need be, in cooperation with the Court of Justice.[197] Fulfilment of the obligation stemming from Article 216(2) TFEU also entails that Member States comply with their structural obligations under Article 19(1) TEU, and deriving from Article 47 CFR:[198] they must provide remedies sufficient to ensure effective legal protection of the rights that derive from EU external agreements.[199]

Hence, Russian professional football player Mr. Simutenkov might have been continuously discriminated against by his Spanish employer in Tenerife in breach of the provisions of the EU-Russia Partnership and Cooperation Agreement,[200] while the Icelandic national I.N. might have been surrendered to the Russian Federation by the Croatian authorities in violation of the EEA Agreement and the EU Charter of Fundamental Rights (CFR),[201] had the Spanish and Croatian courts, respectively, lacked the independence and impartiality[202] to provide effective legal protection of the rights deriving from the respective EU agreements binding Spain and Croatia, as Member States. The situations of those two individuals would have indeed been precarious, had they tried to invoke those rights today before Polish and/or Hungarian courts, or to obtain a preliminary ruling from the Court of Justice on the potential invocability of the provisions of the EU agreements at hand.[203]

3.2.2. EU obligation to enforce

Being bound by EU external agreements, the Union's institutions and Member States must mobilize available enforcement tools to address breaches of the rule of law that jeopardize the effective application of those agreements. A diligent recourse to those tools is critical to ensure that the EU conducts its external action in accordance with the rule of law, as required by the provisions of e.g. Articles 21, 23 TEU and 205 TFEU. While it would damage the EU's credibility as a rule of law defender, failure to act decisively may also, as will be discussed later, open the possibility for interested third parties themselves to react to, and challenge the EU prevarication.

In line with Article 17(1) TEU, it is primarily the task of the European Commission, under the control of the Court of Justice, to oversee the application of EU external agreements, if need be by activating the infringement procedure set out in Article 258 TFEU.[204] It is by tackling a Member State's defective compliance with

---

[197] Case C-63/99, *Gloszczuk*, EU:C:2001:488, Case C-171/01*Wählergruppe Gemeinsam*, EU:C:2003:260; Case C-265/03, *Simutenkov*, EU:C:2005:213 ; Case C-97/05, *Gattoussi*, EU:C:2006:780; Case C-464/14, *SECIL,* EU:C:2016:896.

[198] Case C-64/16, *Associação Sindical dos Juízes Portugueses*, EU:C:2018:117.

[199] Acknowledging that not all agreements entail such individual rights, see e.g. Case C-149/96 *Portugal v Council,* EU:C:1999:574, Case C-308/06, *Intertanko and Others* (EU:C:2008:312).

[200] Case C-265/03, *Simutenkov*, EU:C:2005:213, ¶ 21.

[201] Case C-897/19 PPU, *Ruska Federacija v. I.N.*, EU:C:2020:262. See further, Halvard Haukeland Fredriksen and Christophe Hillion, "The 'special relationship' between the EU and the EEA EFTA States – free movement of EEA citizens in an extended area of freedom, security and justice" (2021) 58 *Common Market Law Review* p. 851.

[202] See Joined Cases C-585/18, C-624/18 and C-625/18, *A.K. and others*, EU:C:2019:982.

[203] ibid. See also Case C-619/18, *Commission* v *Poland (Independence of the Supreme Court)*, EU:C:2019:531; Joined Cases C-357/19, C-379/19, C-547/19, C-811/19 and C-840/19, *Euro Box Promotion and Others*, EU:C:2021:103; Case C-430/21, *RS,* EU:C:2022:99.

[204] Case C-13/00, *Commission* v *Ireland*, EU:C:2002:184. See also in this sense : Déclaration conjointe de Jean-Yves Le Drian, Ministre des Affaires étrangères et de Heiko Maas, Ministre des Affaires étrangères de l'Allemagne (9 octobre 2021) ; https://www.diplomatie.gouv.fr/fr/dossiers-

EU external commitments that the Commission guarantees that the Union fulfils its international obligations, pre-empts disputes with EU partners, and prevents the Union's international liability being engaged.[205] In this task, the Commission must not only ensure that Member States' domestic rules are substantively compliant with obligations deriving from EU external obligations, it must also ascertain that national structures are such as to guarantee effective implementation of the EU external policies, including by way of providing effective protection of the rights potentially deriving therefrom (in line with Article 19(1) TEU and Article 47 CFR). Moreover, the Commission must tackle Member States' (mis)conducts that impede the EU's ability to carry out its tasks and fulfil its objectives, e.g. behaviours that harm the effectiveness of its international action, or hamper its credibility and reputation on the international scene, in breach of their obligation of sincere cooperation enshrined in Article 4(3) TEU.[206]

Considering the preventive dimension of the law of EU external action,[207] a pro-active EU approach may indeed be warranted also "to forestall complications [for the Union] which would result from [such] legal disputes"[208] provoked by a Member State's breach of the rule of law. The Commission as guardian of the Treaties ought to engage early and actively to prevent the internal erosion of the rule of law from "provok[ing] serious difficulties, not only in the internal EU context, but also in that of international relations, and (…) give rise to adverse consequences for all interested parties, including third countries".[209] Other institutions, including the Court of Justice, must indeed assist the Commission in this respect, in line with their duty to practice sincere cooperation set out in Article 13(2) TEU.

Alongside the Commission, each Member State holds a responsibility to ensure that the others comply with all EU external commitments, and with the rule of law particularly in the conduct of the EU external action. [210] They may indeed activate the inter-state infringement procedure of Article 259 TFEU, especially if the Commission does not act as systematically as it should.[211] That same responsibility, and interest in

---

pays/pologne/evenements/article/pologne-declaration-conjointe-de-jean-yves-le-drian-ministre-des-affaires

[205] Case C-66/18, *Commission v Hungary (Lex CEU),*EU:C:2020:792.

[206] Case C-620/16, *Commission v Germany (COTIF II),* EU:C:2019:256.

[207] Consider in this sense the Opinion Procedure foreseen in Article 218(11) TFEU (as applied in e.g. Opinion 1/17 *re: CETA*, EU:C:2019:341 and discussed by e.g. Marise Cremona, "The Opinion procedure under Article 218(11) TFEU: Reflections in the light of Opinion 1/17"(2020) 4 *Europe and the World: A law review*, p. 1), and the so-called "*AETR* effect" (based on the Court's ruling in Case 22/70, *Commission v Council*, EU:C:1971:32 and analysed by e.g. Merijn Chamon, "Implied exclusive powers in the ECJ'S post-Lisbon jurisprudence: The continued development of the *ERTA* doctrine" (2018) 55 *Common Market Law Review* p. 1101).

[208] See Opinion 1/75, *re: Local Cost Standard,* EU:C:1975:145, Opinion 1/09, *re: Unified Patent Court,* EU:C:2011:123.

[209] Opinion 1/20, *re: Energy Charter Treaty*, EU:C:2022:485, Opinion 1/19, *re : Istanbul Convention*, EU:C:2021:832.

[210] See in this sense, Council of the EU, *Conclusions of the Council of the European Union and the Member States meeting within the Council on Ensuring Respect for the Rule of Law*, General Affairs Council meeting, Brussels, 16 Dec. 2014.

[211] See e.g., Dimitry Kochenov, "Biting Intergovernmentalism: the case for the reinvention of article 259 TFEU to make it a viable rule of law enforcement tool" (2015) 7 *Hague Journal on the Rule of Law*, p. 153. See also the resolution of the Dutch House of Representatives urging the government to explore the possibility to bring Poland to before the European Court of Justice (Tweede Kamer, "Motie van het lid

preserving its reputation in relation to the wider world, ought also to frame each Member State's approach towards other mechanisms to help enforce the rule of law in the EU, including Article 7 TEU, or internal conditionality mechanisms, in the sense of ensuring that they are systematically and effectively used.[212] Those intra-EU rule of law mechanisms do have a particular function to secure that the EU upholds the rule of law in general, and in the conduct of its external action in particular.

The vertical and horizontal monitoring and enforcement mechanisms thus recalled, arguably apply irrespective of the EU external competence being exercised. With respect to EU external agreements in particular, Member States' obligations deriving from Article 216(2) TFEU, and those of Article 19(1) TEU, are formulated in general terms, and are not deemed to vary depending on whether the agreement relates to the CFSP or the non-CFSP aspects of the EU external action.[213] Like Article 218 TFEU setting out the EU treaty-making procedure, Article 216 TFEU "is of general application and is therefore intended to apply, in principle, to all international agreements negotiated and concluded by the European Union in all fields of its activity, including the CFSP".[214] This in turn means that "it cannot be argued that the scope of the limitation, by way of derogation, on the Court's jurisdiction envisaged in the final sentence of the second subparagraph of Article 24(1) TEU and in Article 275(1) TFEU goes so far as to preclude the Court from having jurisdiction to interpret and apply a provision such as Article [216(2)] TFEU which does not fall within the CFSP".[215] In sum, the Court's jurisdiction over Article 216 TFEU is not circumscribed to non-CFSP agreements.

Enforcement of Member States' obligations deriving from Article 216 TFEU, and by implications those of Article 19(1) TEU, is critical to secure that the EU complies with its international obligations, and with the constitutional requirement that its external action be conducted in accordance with the rule of law, including in the area of CFSP.[216]

3.2.3. Partners' expectations

That EU institutions and Member States fulfil their obligation to observe the rule of law also matters for third states and international organizations. As alluded to earlier, one may assume that EU partners interact with the EU as a subject of international law, based on an expectation that it will fulfil its commitments. In particular, they may expect from the EU as a rule-based legal order, and more

Groothuizen c.s. over onderzoek om Polen voor het Europese Hof van Justitie te dagen", November 16, 2020). For an explanation, see Luuk Molthof, Nienke van Heukelingen, Giulia Cretti, "Exploring avenues in the EU's rule of law crisis - What role for the Netherlands?" *Clingendael Policy Brief,* August 2021: <https://www.clingendael.org/sites/default/files/2021-08/
Policy_briefs_Exploring_avenues__EUs_rule_of_law_crisis_September_2021.pdf>

[212] Regulation (EU, Euratom) 2020/2092 of the European Parliament and of the Council of 16 December 2020 on a general regime of conditionality for the protection of the Union budget, *OJ L 433I , 22.12.2020, p. 1–10*.

[213] Article 216(2) TFEU does not include any indication that CFSP agreements based on Article 37 TEU and concluded in accordance with Article 218 TFEU have a different legal nature within the EU legal order.

[214] Case C-658/11, *Parliament v Council (Mauritius),* EU:C:2014:2025.

[215] Ibid.

[216] See discussion under section 3.1, above.

specifically from the latter's custodians, that they secure full implementation of the Union's external commitments, including the protection of the rights deriving therefrom. That expectation might be all the stronger considering the EU's identity, its foundations and objectives, and the related principles it promotes externally, notably as a condition for establishing and deepening its external relations. EU partners naturally assume that a Member State's deviation from its EU obligations, which hampers the effective implementation of an EU international agreement, will be adequately addressed through effective remedies, so that the rule of law is eventually restored.

External scrutiny of the EU in this field is growing against the backdrop of a rule of law regression in some of its Member States, and particularly as regards the functioning of their judiciaries. The case of Poland is illustrative of the phenomenon. In view of the growing number of decisions from the European Court of Human Rights[217] and from the European Court of Justice,[218] the trustworthiness of the Polish judicial system has steadily declined, not only in the eyes of several Member States' judges,[219] but also outside the Union. This has become particularly visible in the case of judges from third states which, like close neighbours from the European Free Trade Association (EFTA), have concluded agreements with the EU that involve mechanisms of mutual recognition of judicial decisions. A case in point is the EU-Norway/Iceland Surrender Procedure Agreement, [220] which extends the system established by the European Arrest Warrant to the two Nordic countries.[221] In this context, several courts in Norway have shown increased reluctance to fulfil their obligations of mutual recognition and execute judicial decisions enacted in Poland, out of concern that individuals to be surrendered might not get a fair trial in Polish

[217] For an analysis of this case law, see Laurent Pech and Dimitry Kochenov, *Respect for the Rule of Law in the Case Law of the European Court of Justice: A Casebook Overview of Key Judgments since the Portuguese Judges Case*, Swedish Institute for European Policy Studies, Report 2021:3. See also: Rafał Mańko, *European Court of Justice case law on judicial independence*, Briefing, European Parliament Research Service:
<https://www.europarl.europa.eu/RegData/etudes/BRIE/2021/696173/EPRS_BRI(2021)696173_EN.pdf>

[218] See decisions of the ECtHR in e.g. case *Xero Flor w Polsce sp. z o.o. v. Poland,* no. 4907/18, 7 May 2021; *Broda and Bojara v. Poland,* nos. 26691/18 and 27367/18, 29 June 2021; *Reczkowicz v. Poland*, no. 43447/19, 22 July 2021; and *Dolińska-Ficek and Ozimek v. Poland*, nos. 49868/19 and 57511/19, 8 November 2021*; Advance Pharma sp. z o.o v. Poland*, no. 1469/20, 3 February 2022; *Juszczyszyn v. Poland*, no. 35599/20, 6 October 2022. See also the Report by the Secretary General under Article 52 of the European Convention on Human Rights on the consequences of decisions K 6/21 and K 7/21 of the Constitutional Court of the Republic of Poland (9 November 2022: <https://rm.coe.int/report-by-the-secretary-general-under-article-52-of-the-european-convention/1680a8eb59>), and the 2017 Opinion of the European Commission for Democracy through Law (Venice Commission) on Poland's draft legislations concerning its judicial system:
<https://www.venice.coe.int/webforms/documents/default.aspx?pdffile=CDL-AD(2017)031-e >

[219] See e.g. the decision of 17/02/2020 of the Oberlandsgericht Karlsruhe (Higher Regional Court in Karlsruhe), DE:OLGKARL:2020:0217.AUSL301AR156.19.00. Further see: Anna Wójcik, "Muzzle Law leads German Court to refuse extradition of a Pole to Poland under the European Arrest Warrant", 6.03.2020, <https://ruleoflaw.pl/muzzle-act-leads-german-to-refuse-extradition-of-a-pole-to-poland-under-the-european-arrest-warrant/ >.

[220] Agreement between the European Union and the Republic of Iceland and the Kingdom of Norway on the surrender procedure between the Member States of the European Union and Iceland and Norway, *OJ L 292, 21.10.2006, p. 2–19.*

[221] Council Framework Decision of 13 June 2002 on the European arrest warrant and the surrender procedures between Member States - Statements made by certain Member States on the adoption of the Framework Decision, *OJ L 190, 18.7.2002, p. 1–20*

courts, in breach of Article 6 of the European Convention of Human Rights. Norway's Supreme Court indeed warned "that the systematic and general shortcomings of the Polish judiciary are so extensive and pervasive that it takes relatively little concrete circumstances before an arrest warrant must be rejected under the Arrest Warrant Act [which implements the Surrender Agreement with the EU in Norwegian Law] (…) it cannot be ruled out that arrest warrants must also be rejected in more ordinary criminal cases in certain situations."[222]

Such a negative appraisal of an EU Member State's judicial system by the Supreme Court of a third state having a "special relationship" [223] based on "mutual confidence"[224] with the Union, should be cause for concern.[225] In view of the Court of Justice's integrated conception of the EU judicial system comprising Member States courts as EU courts,[226] it is by implication the trustworthiness of the EU judicial system as a whole that is being questioned from the outside, and ultimately the credibility of the EU as subject of international law.

While damaging third parties' trust in the Union's court system, the conduct of regressive Member States may also affect the implementation of the EU external action, by disrupting the functioning of the bodies established by EU external agreements. A case in point is the institutional framework of the Agreement on the European Economic Area (EEA) whose Council, made up of representatives of the contracting parties, has been unable to operate as envisaged because of the obstruction of the Hungarian government.[227] The reason behind the latter's conduct is the contention that the EEA EFTA states (Iceland, Norway, Liechtenstein), and Norway in particular, violated their EEA obligations. The allegation relates to an earlier decision by those states not to allocate funding to Hungary, as beneficiary state under the Financial Mechanism established by the EEA Agreement.[228] That decision follows a dispute between the EEA EFTA states and Hungary regarding the choice of entity tasked to manage the EEA funds to be allocated to Hungarian civil society.[229] The disagreement arose in the broader context of the ongoing democratic and rule of law

---

[222] Our translation. For the original version, see: <https://www.domstol.no/no/hoyesterett/avgjorelser/2022/hoyesterett---straff/HR-2022-863-A/> ¶¶ 69-70.

[223] See Case C-897/19 PPU, *Ruska Federacija v. I.N.*, EU:C:2020:262.

[224] See Preamble of the EU-Norway/Iceland Surrender Procedure Agreement, op. cit.

[225] Polish judiciary was also excluded from the ENCJ, and from cooperation programmes financed under the financial mechanism established by the EEA Agreement. Eirik Holmøyvik: "No Surrender to Poland", *Verfassungblog*, 2 November 2021 <https://verfassungsblog.de/no-surrender-to-poland/>; Eirik Holmøyvik, "For Norway it's Official: The Rule of Law is No More in Poland", *Verfassungblog,* 29 February 2020 <https://verfassungsblog.de/for-norway-its-official-the-rule-of-law-is-no-more-in-poland/>.

[226] Opinion 1/09, *Unified Patent Court*; Case C-64/16, *Associação Sindical dos Juízes Portugueses,* EU:C:2018:117.

[227] <https://hungarytoday.hu/hungary-vetoes-final-declaration-of-eea-meeting/>; <http://www.nordiclabourjournal.org/nyheter/news-2021/article.2021-11-26.4825957081>.

[228] Articles 115-117 EEA Agreement, and Protocol 38C of the EEA Agreement. Further on that mechanism, see Per Christiansen, "Part VIII: Financial Mechanism" in Finn Arnesen, Halvard H Fredriksen, Hans-Petter Graver, Ola Mestad and Christoph Vedder (eds.), *Agreement on the European Economic Area – a Commentary*, (C.H.Beck et al, 2018), p. 891.

[229] <https://www.politico.eu/article/hungary-loses-norwegian-funds-as-rule-of-law-concerns-intensify/>.

regressions in the country since the start of the 2010s, including harassment of civil society organizations partly financed by EEA funds.[230]

The disruptive conduct of the Hungarian Government has not only impeded the EU position in, and functioning of, the institutional framework at hand. It has also challenged the rule of law in the external action of the EU more generally. As the Court of Justice has established, "a Member State may not unilaterally adopt, on its own authority, corrective or protective measures designed to obviate any breach … of rules of [EU] law".[231] Incompatible with the dispute settlement system envisaged by the EEA itself, which is part of EU law, the unilateral stance of the Hungarian Government undermines the overall "special relationship [with] between the European Union, its Member States and the EFTA States, which is based on proximity, long-standing common values and European identity", falls foul of its obligation of sincere cooperation and the requirement of unity in the international action and representation of the EU,[232] while injuring the EU reputation more generally.[233]

The two Member States' damages to the Union's judicial and institutional structures call for action from EU institutions and other Member States, all the more so considering the nature of the relations at hand. Recall that Article 8 TEU mandates the Union to establish an area of "good neighbourliness founded on the values of the Union and characterized by close and peaceful relations based on cooperation".[234] That mandate arguably entails a higher level of commitment and accountability of the Union in relation to those partners.

3.2.4. External accountability

The final part of this discussion reflects on how third states (and their nationals) may react to the rule of law deterioration in the EU, and to its negative effects on their relations therewith, especially if the custodians of the EU legal order do not undertake adequate measures to reverse it. In particular, it asks what potential mechanisms and remedies – if any – third states may rely on, under EU law, to ensure that their rights (and those of their nationals) are effectively protected, considering that the availability of such remedies is in itself an indication of the degree to which the EU is conducting its external action in accordance with the rule of law. The discussion pays particular attention to states with which the EU has deeper relations, that is relations that are more prescriptive in terms of rule of law observance.

EU partners (and their nationals) may indeed activate various EU tools to counter the effects of the rule of law deterioration within the Union, based on the agreements they have with it, and on EU law more broadly. These tools may ultimately contribute to pressing the Union to address the internal impediments to the effective

---

[230] <https://euobserver.com/eu-political/125537>; <https://www.reuters.com/article/hungary-norway-idUSL5N0RA1TV20140909>.

[231] Case C-45/07, *Commission v Greece (IMO)*, EU:C:2009:81; Case 232/78, *Commission v France*, EU:C:1979:215.

[232] See also Case C-246/07, *Commission v Sweden (PFOS)*, EU:C:2010:203; Case C-620/16 *Commission v Germany (COTIF)*, EU:C:2019:256.

[233] Case C-897/19 PPU, *Ruska Federacija v. I.N.*, EU:C:2020:262; see also Case C-431/11 *UK v Council*, EU:C:2013:589.

[234] See section 2.1, above.

implementation of its international commitments, including Member States' rule of law regressions. The recent case law of the Court of Justice arguably opens new avenues in this respect.

A third country that is affected by a Member State's breach of the rule of law, may decide to recalibrate its relations with the EU, or even suspend its cooperation therewith. Several devices discussed earlier, and which the Union has itself inserted in its external agreements to promote the rule of law, could be mobilized to that effect. At a basic level, dispute settlement mechanisms, where envisaged by EU international agreements, would presumably have to be activated. However, their effectiveness might be hampered, considering that a Member State may hijack their operation as the Hungarian Government has revealed.[235] To be sure, their activation does not preclude the use of other devices based on EU law.[236] The affected EU partner could also invoke the "essential element" clauses referring to the rule of law as founding the internal and external policies of the parties, if it considers that the EU does no longer comply with the standards the agreements envisages as essential elements, including the rule of law. In the same vein, third states may use conditionality mechanisms in reaction to EU internal regressions of the rule of law, where such instruments exist. As alluded to above, a case in point is the EEA financial mechanism, whose operations may be, and has indeed been, suspended when principles upon which its activities are based are not observed.[237] In sum, tools that the EU has traditionally deployed to promote and uphold the rule of law on its relations with third countries could have a boomerang effect and operate the other way.

Moreover, administrative and judicial authorities of third states that have concluded mutual recognition arrangements with the Union may decide no longer to recognize and follow decisions taken by their counterparts in regressive Member States. The ruling of Norway's Supreme Court, mentioned above, suggests that the deterioration of the rule of law in a Member State may reach a point beyond which lower Norwegian courts will no longer have the necessary confidence "in the structure and functioning of [the EU] legal systems",[238] and thus refuse to surrender an individual to a Member State on grounds that she might not get a fair trial. Similar developments, i.e. suspension of automatic execution by third states' courts of EU courts' decisions in line with mutual recognition arrangements, could occur in the framework of the Lugano Convention too, which establishes a system of free

---

[235] See section 3.2.3, above.

[236] Case C-66/18, *Commission v Hungary (Lex CEU),* EU:C:2020:792.

[237] In reaction to controversial legislative developments concerning the justice system of Poland, which is the main beneficiary of EEA funding, the Norwegian Courts' Administration withdrew from its cooperation with its Polish counterpart under the Justice programme financed under the EEA Financial Mechanism. Following that decision, the Norwegian Government decided not to sign a planned agreement with Poland on cooperation in the justice sector under the EEA Financial Mechanism. See: Norway's Ministry of Foreign Affairs, "Norway to reconsider judicial cooperation with Poland under the EEA and Norway Grants", Press Release 27.02.2020 <https://www.regjeringen.no/en/historical-archive/solbergs-government/Ministries/ud/news/2020/reconsider_cooperation/id2691680/>. Further: Eirik Holmøyvik, "*For Norway it's Official*", op. cit.

[238] As envisaged in the preamble of the Surrender Procedure Agreement as premiss upon which the parties accept to apply the principle of mutual recognition of their respective courts decisions: Agreement between the European Union and the Republic of Iceland and the Kingdom of Norway on the surrender procedure between the Member States of the European Union and Iceland and Norway, *OJ L 292, 21.10.2006, p. 2–19.*

movement of civil and commercial courts' decisions between the EU and the EFTA states.[239] The same phenomenon could indeed affect the decisions of other national authorities relating to the functioning of the single market (e.g. competition authorities)[240] which the EEA Agreement extends to Iceland, Liechtenstein and Norway,[241] or in connection with the operation of the Area of Freedom, Security and Justice.

The suspension by third states' authorities of mutual recognition mechanisms with EU Member States might indeed be less implausible a development in the context of EU external agreements, than in the framework of the EU itself. While potentially significant in some EU external agreements, the EU principles of mutual recognition and trust that the Court of Justice has articulated in Opinion 2/13 and which it has been adamant to preserve since,[242] do not constrain third states' relations with EU Member States as much as they bind Member States inter se. Even if they are closely integrated with the EU legal order through a "special relationship", EU partners are not included to the same extent in the "structured network of principles, rules and mutually interdependent legal relations, binding the European Union and its Member States reciprocally as well as binding its Member States to each other".[243] Thus, while they may take account of a European Council decision under Article 7(2) TEU establishing the existence of a serious and persistent breach of EU values by a regressive Member State, Norway's or Iceland's courts are not (as) legally dependent on that decision to decide themselves to suspend mutual recognition e.g. under the Surrender Procedure agreement,[244] the way Member States' courts are under the European Arrest Warrant as interpreted by the Court of Justice.[245]

The authorities of EU partners however close they are to the EU, may be less inhibited, legally and practically, to take earlier and bolder steps in reaction to the deterioration of the rule of law within an EU Member State, by reference to their own constitutional norms and/or international obligations such as the ECHR. A failure effectively to address the deterioration of the rule of law in some Member States and the impact it has for the functioning and external reputation of the EU judicial and

---

[239] Convention on jurisdiction and the recognition and enforcement of judgments in civil and commercial matters, *OJ L 339, 21.12.2007, p. 3–41.*

[240] Case T-791/19, *Sped-Pro S.A. v European Commission*, EU:T:2022:67.

[241] Case C-897/19 PPU, *Ruska Federacija v. I.N.*, EU:C:2020:262; see also Case C-431/11 *UK v Council*, EU:C:2013:589.

[242] Through its reiterated, though contested, *LM* case law: case C-216/18 *LM*, EU:C:2018:586, case C-562/21 PPU and C-563/21 PPU *Openbaar Ministerie (Tribunal established by law in the issuing Member State*, EU:C:2022:100; case C-480/21 *WO*, EU:C:2022:592. For a critical analysis of this case law, see e.g. Petra Bard and John Morijn, "Luxembourg's Unworkable Test to Protect the Rule of Law in the EU" (part I) *VerfBlog,* 2020/4/18, <https://verfassungsblog.de/luxembourgs-unworkable-test-to-protect-the-rule-of-law-in-the-eu/> and Part II: *VerfBlog,* 2020/4/19: <https://verfassungsblog.de/domestic-courts-pushing-for-a-workable-test-to-protect-the-rule-of-law-in-the-eu/>

[243] Case C-621/18, *Wightman*, EU:C:2018:999, ¶45.

[244] It does not mean that such a European Council decision would be of no relevance for Norwegian courts. Indeed in its ruling mentioned above, the Supreme Court of Norway did refer to the effect that a decision of the European Council under Article 7(2) TEU would have for the operation of the European Arrest Warrant, thereby suggesting that such a decision, could also prompt the suspension by Norwegian courts of mutual recognition under the Surrender Procedure Agreement that extends the application of the EAW to Norway and Iceland, even if such scenario is not contemplated in the latter Agreement.

[245] See Case C-216/18, *LM*, EU:C:2018:586, Joined Cases 562/21 PPU and C-563/21 PPU, *X and Y v Openbaar Ministerie*, EU:C2022:100.

administrative system as a whole, may mean that the mutual recognition of national authorities' decisions which several EU agreements envisage with third countries, and the confidence the latter have "in the structure and functioning of [the EU] legal systems", may collapse.[246] A decision by a third state's court(s) no longer to execute an EU court's decision would indeed send a powerfully negative signal to the Union and Member States, and to their partners. It would indicate that the integrated judicial system of the Union is no longer reliable, and the need for the EU to restore confidence in its compliance with the rule of law. That same decision could indeed have ripple effects across the EU, as some Member States' courts have already expressed increased discomfort in recognizing and executing judicial decisions from regressive Member States.[247]

Beyond the impact on the Union's reputation and credibility, the deterioration of the rule of law in its own Member States could also raise the question of whether the European Court of Human Rights may revisit its evaluation of how fundamental rights are safeguarded within the EU legal order. Recall that in its *Bosphorus* ruling, the ECtHR found that the protection of fundamental rights by EU law could be considered as "equivalent", in the sense of "comparable", to that of the ECHR system.[248] The capacity of the EU effectively to stop and reverse such regression will be critical to maintain that equivalence.

While third parties may call the EU to account on the basis of its external agreements, they may also rely on EU law more generally. If the EU fails to address instances of Member States' non-compliance with its international commitments, and does not restore the rule of law, it is arguable that affected third states - or indeed their nationals - may contest that prevarication before the Court of Justice. The EU is bound by international law in its entirety,[249] and in particular "the general international law principle of respect for contractual commitments (*pacta sunt servanda*)", and thus to implement its international agreement in good faith. And as recalled earlier, it "may not rely on the provisions of its internal law as justification for failure to comply with its obligations under international law".[250]

In circumstances where private enforcement through a Member State's courts or through an agreement-based dispute settlement are obstructed by regressive Member States, third states - and their nationals - depend on EU public enforcement to ensure implementation of their agreement with the EU, and have their rights protected. They

---

[246] The European Court of Human Rights has been asked to determine whether the above mentioned decision of the Supreme Court of Norway, which allowed the surrender of a Polish citizen to Poland, is compatible with the ECHR: case *Knihinicki v. Norway*, No. 36356/22 <https://hudoc.echr.coe.int/eng#{%22documentcollectionid2%22:[%22COMMUNICATEDCASES%22],%22itemid%22:[%22001-224227%22]}>

[247] See in this regard, the decision of the Irish Supreme Court of 4 August 2022 in *Minister for Justice & Equality -v- Orlowski; Minister for Justice & Equality -v- Lyszkiewicz*, [2022] IESC 37 <https://www.courts.ie/view/Judgments/30f5489d-2b83-4201-930c-31fd821f3b09/ae3c6e76-65b1-418b-a8ed-2324a64dd7f1/2022_IESC_37.pdf/pdf>. On those ripple effects, see e.g. Christophe Hillion, "A(nother) lost opportunity? The European Council and domestic assaults on the EU constitutional order", *Verfassungsblog,* 2021/11/03, <https://verfassungsblog.de/another-lost-opportunity/>.

[248] See *Bosphorus*, no. 45036/98, 30 June 2005, para 165; *Avotiņš v. Latvia*, no. 17502/07, 23 May 2016.

[249] Case C-266/16, *Western Sahara Campaign UK*, EU:C:2018:118.

[250] Case C-66/18, *Commission v Hungary (Lex CEU),*:EU:C:2020:792.

cannot themselves bring an action against an EU Member State to the Court of Justice as the inter-state dispute settlement mechanism of Article 259 TFEU is only open to "Member States". The Commission's role as guardian of the Treaties is thus critical to compensate for the deficiency of private, and absence of inter-states enforcement mechanisms. More specifically, the infringement procedure constitutes a critical tool to ensure that the EU to fulfil its international obligations, and ultimately that it conducts its external action in compliance with the rule of law.[251]

But what if the Commission (and/or Member States) is reluctant to intervene and to enforce EU law in those situations?[252] Can affected third states, and/or their nationals, challenge the EU lack of action to protect their rights, and the non-enforcement of the rule of law? Arguably, the recent case law of the European Court of Justice opens new ways for affected third states to contest the potential lack of EU decisive (re)action. Space precludes a detailed analysis of this novel development in terms of the EU protection of third states' interests by reference to the rule of law. The following discussion will only flag a couple of - admittedly speculative - points.

In its *Venezuela* ruling, the Court of Justice acknowledged that third states could have standing as legal persons to contest the legality of EU actions under Article 263(4) TFEU. It did so in the following fashion:

> an interpretation of the fourth paragraph of Article 263 TFEU in the light of the principles of effective judicial review and the rule of law militates in favour of finding that a third State should have standing to bring proceedings, as a 'legal person', within the meaning of the fourth paragraph of Article 263 TFEU, where the other conditions laid down in that provision are satisfied. Such a legal person governed by public international law is equally likely as any another person or entity to have its rights or interests adversely affected by an act of the European Union and must therefore be able, in compliance with those conditions, to seek the annulment of that act.[253]

---

[251] On the importance of the infringement procedure based on Article 258 TFEU to enforce the rule of law, see Joni Heliskoski, "Infringement proceedings as a tool for enforcing the rule of law in EU Member States – a critical review" in Allan Rosas, Pekka Pohjankoski and Juha Raitio (eds), *The Rule of Law's Anatomy in the EU: Foundations and Protections* (Hart, forthcoming), Pekka Pohjankoski, "Rule of law with leverage: Policing structural obligations in EU law with the infringement procedure, fines, and set-off", (2021) 58 *CMLRev*. p. 1341; Kim Lane Scheppele, Dimitry Vladimirovich Kochenov, Barbara Grabowska-Moroz, "EU Values Are Law, after All: Enforcing EU Values through Systemic Infringement Actions by the European Commission and the Member States of the European Union", (2020) 39 *Yearbook of European Law*, p. 3; Matthias Schmidt and Piotr Bogdanowicz, "The infringement procedure in the rule of law crisis: How to make effective use of Article 258 TFEU", (2018) 55 *CMLRev* p. 1061; Hillion, "Overseeing the rule of law in the EU", op. cit.

[252] See in this sense Daniel Kelemen and Tomasso Pavone, "Where Have the Guardians Gone? Law Enforcement and the Politics of Supranational Forbearance in the European Union" (2023) 74 *World Politics* (forthcoming); Gráinne de Búrca, "Poland and Hungary's EU membership: On not confronting authoritarian governments" (2022) 20 *International Journal of Constitutional Law*, p. 1; Laurent Pech, Patryk Wachowiec and Dariusz Mazur, "Poland's Rule of Law Breakdown: A Five-Year Assessment of EU's (In)Action" (2021) 13 *Hague Journal on the Rule Law*, p. 1; Sonja Priebus, "The Commission's Approach to Rule of Law Backsliding: Managing instead of Enforcing Democratic Values" (2022) 60 *Journal of Common Market Studies*, p. 1.

[253] Case C-872/19P, *Venezuela*, EU:C:2021:507

Having standing as "a legal person" to challenge the legality of an EU act, that same third state would arguably have standing, also as "legal person", to contest the legality of a *failure* to act under Article 265(3) TFEU. It would be awkward for the Court of Justice to adopt two different approaches to third states' standing whether targeted at an unlawful action or whether it concerns an unlawful failure to act, especially since the Court has otherwise recognized that both procedures (Articles 263 and 265 TFEU) "merely prescribe one and the same method of recourse".[254]

An affected third state would then have to overcome two additional hurdles successfully to challenge the Commission's failure to act, viz. to address a Member State's failure to fulfil its obligations under the external agreement of the Union, and thereby to preserve the rule of law.

To begin with, the applicant must demonstrate that "the Union has failed to address to that person [in casu, a third state as legal person] any act other than a recommendation or an opinion" (Article 265(3) TFEU). According to established case law, that condition itself entails two requirements:

> that natural or legal person must establish either that he, she or it is the addressee of the act which the institution complained of allegedly failed to adopt in respect of that person, or that that act directly and individually concerned him, her or it in a manner analogous to that in which the addressee of such an act would be concerned (…).
>
> Moreover, such a natural or legal person must show an interest in bringing proceedings on the basis of Article 265 TFEU, the existence of which presupposes that the action must be liable, if successful, to procure an advantage to the party bringing it.[255]

The requirement to "show an interest in bringing proceedings", mentioned in the second paragraph of the quote above should not be overly difficult for the third state to show. Such an interest could be established if the situation at hand involves the Commission's failure to address a Member State's breach of EU law, having the effect of depriving the applicant, viz. the third country (and its nationals) from the effective enjoyment of the rights stemming from an agreement it has concluded by the Union. While there is no guarantee that the infringement would be confirmed should it reach the Court, the sought-after Commission action, should it be activated, might in itself be significant in pressing the recalcitrant Member State to comply with its EU obligations, and implement the agreement at hand.[256] It is arguable that the action would "procure an advantage to the [third state] bringing it".[257]

---

[254] According to the Court the two procedures are complementary: Case 15/70, *Amedeo Chevalley v Commission*, EU:C:1970:95. See also the terms of Article 266 TFEU.

[255] See e.g. Case T-350/20 *Lukáš Wagenknecht* EU:T:2020:635.

[256] See in this regard, the significance of the Commission's reasoned proposal in the context of the procedure of Article 7(1) TEU, as established by the Court's order in Case C-619/18R, *Commission v Poland*, EU:C:2018:1021, ¶85.

[257] If the action before the Court of Justice was successful, it could provide additional legal ammunitions to the third state in question and/or its nationals, in potential actions for damages against the EU, on the basis of Article 268 TFEU and Article 340(2) TFEU, and under the (demanding) conditions set out by the Court in Case 5/71, *Zuckerfabrik Schöppenstedt*, EU:C:1971:116; acknowledging that "unlawfulness (…) is not a sufficient basis for holding that the non-contractual liability of the European

The other requirement, referred to in the preceding paragraph of the quoted ruling, might be more difficult to fulfil. The question at this point is whether the Commission's activation of the infringement procedure against a Member State, whose unlawful conduct impedes the implementation of an EU external agreement, would qualify as a course of action to which the applicant third state as party to this agreement is entitled. It is arguable that it is if, for instance, the Commission's action is the only available remedy left for a third state to ensure that the Member State complies with its EU obligations, given that individuals may no longer rely on the regressive Member State's captured courts to provide effective judicial protection.[258] The affected third state would first have to call on the Commission to act, as required by Article 265 TFEU. If, within two months the Commission would not define its position, the third state could then bring the case to the Court of Justice, within another period of two months.

The second hurdle relates to the discretion the Commission has conventionally enjoyed in the operation of the infringement procedure. It is indeed based on that discretion, interpreted as being broad, that the Court of Justice has traditionally found against the argument that the Commission may be compelled to trigger the infringement procedure under Article 258 TFEU, and in turn against the notion that the failure to commence proceedings might amount to a failure to act under Article 265 TFEU.

The usual authority to which the case law refers to support that approach, namely *Star Fruit*,[259] relates to a situation in which a Belgian firm had asked the Commission to take action, in the form of an activation of the infringement procedure against France. The Court held that: "based on the scheme of Article 169 of the Treaty [as it then was, now Article 258 TFEU] the Commission is not bound to commence the proceedings provided for in that provision but in this regard has a discretion which excludes the right for *individuals* to require that institution to adopt a specific position" (emphasis added).[260]

The situation under consideration would differ significantly from the one the Court had to address in the *Star Fruit* case, at least in terms of the situation of the claimant involved, the legal context in which the claim is made, and indeed the function of the infringement procedure in the situation at hand, relative to other remedies. In particular, the latter situation involves a close EU partner, i.e. legal person located outside the EU, requesting the Commission as guardian of the Treaties and as external representation of the Union,[261] to take steps to ensure that the latter fulfils its obligations towards it (and its nationals), in the form of an action against a Member

---

Union, flowing from illegal conduct on the part of one of its institutions, has automatically arisen. In order for that condition to be met, the case-law requires the applicant to demonstrate, first, that the institution in question has not merely breached a rule of law, but *that the breach is sufficiently serious and that the rule of law was intended to confer rights on individuals*" (emphasis added) (see Case T-692/15 *HTTS Hanseatic Trade Trust*, EU:T:2021:410).

[258] The dispute settlement mechanism may also be blocked as a result of the Member State's behaviour.

[259] See Case 247/87, *Star Fruit*, EU:C:1989:58. For a recent application of that jurisprudence, see e.g. Case C-550/18, *Commission v Ireland*, EU:C:2020:564, ¶59; Case C-575/18P, *Commission v the Czech Republic*, EU:C:2020:530, ¶78; Case C-66/18, *Commission v Hungary (Lex CEU),* EU:C:2020:792, ¶56.

[260] *Star Fruit*, ¶11.

[261] Article 17(1) TEU.

State that does not provide effective legal protection of the rights deriving from the EU agreement(s), thus violating EU law.

The specificities of the situation at hand arguably warrant a different approach from the Commission and the Court, specifically as to the way the discretion to commence proceedings may be conceived and exercised in the context of Article 258 TFEU. This is particularly so in view of the fact that, unlike in *Star Fruit*, the Commission's infringement procedure here may be one of the last, if not the only available means under EU law to help the claimant have its rights protected. The Commission inaction would be particularly problematic in view of the principle that the external action of the EU should be conducted in accordance with the rule of law.[262]

To be sure, the Commission's discretion has never been envisaged as absolute. As it already did in *Star Fruit*, the Court has often referred to "*a* discretion". Thus:

> the principle, established in the settled case-law of the Court, that the Commission has *a discretion to determine whether it is expedient to take action against a Member State* and what provisions, in its view, the Member State has infringed, and to choose the time at which it will bring an action for failure to fulfil obligations; the considerations which determine that choice cannot affect the admissibility of the action. (emphasis added)[263]

The Court has also referred to "the *objective* of the procedure provided for in Article 258 TFEU",[264] namely to find that a Member State has failed to fulfil its EU obligations. This particular objective determines the way the Commission applies the infringement procedure, and in particular the nature and scope of its discretion. The latter should also be envisaged in consideration of the general role which the Commission is mandated to play by the EU constitutional charter, in particular by Article 17(1) TEU, and as a part of the EU institutional framework whose functions, as recalled above, encompasses the promotion of EU values, including the rule of law.[265] Article 17(1) TEU contains mandatory language whereby the Commission "shall ensure the application of the Treaties, and of measures adopted by the institutions pursuant to them [and] shall oversee the application of Union law under the control of the Court of Justice of the European Union" (emphasis added). The mandate of the Commission as guardian of the rule of (EU) law and the way it exercises it, are determined by those constitutional prescriptions,[266] and it is the duty of the Court of Justice to control that the Commission acts accordingly, including in the way in which it exercises its discretion. In particular, the Court must ensure that

---

[262] The Court has shown more openness in an action for damages where no other remedies are available at national level effectively to ensure protection for individuals: see case 20/88 *Roquettes Frères*, EU:C:1989:221, ¶¶15-16. I am grateful to Michal Bobek for this point.

[263] Case C-213/19, *Commission v UK*, EU:C:2022:167, ¶¶163-164.

[264] Ibid., ¶162. See also joined cases C-715/17, C-718/17 et C-719/17, *Commission v Poland* e.a., EU:C:2020:257, ¶¶64ff.

[265] Article 13(1) TEU.

[266] The mandate of the Commission has been significantly widened by the Treaty of Lisbon. As noted by Koen Lenaerts and Piet Van Nuffel, "before the Lisbon Treaty, Article 211 EC listed the tasks which the Commission was to carry out 'in order to ensure the proper functioning and development of the common market'", see *EU Constitutional Law* (OUP, 2012), p. 428, footnote 222.

that discretion is not exercised to the detriment of the objective of Article 258 TFEU, and that of the general task the Commission is entrusted to perform.

Recall that it is on the basis of Article 19(1) TEU, located in the TEU institutional provisions, and its objectives, that the Court of Justice has defined its own jurisdiction, and its particular exercise in the context of the external action, to ensure that it is conducted in accordance with the rule of law.[267] The Court ought to envisage the role of the European Commission established by Article 17 (1) TEU, also located in the institutional part of the TEU, in a similar purposive and systemic fashion.[268]

Also, the Court should oversee the Commission's performance, including in the way it exercises its discretion, in the particular context of the external action of the Union, and the constitutional principles governing it. The Commission's function in that context thus ought to be conceived of in consideration of Articles 21 and 23 TEU, and Article 205 TFEU discussed above, and in particular the obligation for the Union to conduct its external action in accordance with the principles they encapsulate, including the rule of law.

To be sure, the text of Article 265 TFEU does not itself preclude actions against the Commission for failure to instigate an infringement procedure. The provision explicitly recognizes that an action can be directed against the Commission without making any distinction in terms of the powers it exercises – i.e., whether executive, representation, or monitoring powers. Moreover, Article 265 TFEU envisages a complaint to the Court that an institution, body, office or agency of the Union has failed to address to that person any act other than a recommendation or an opinion. In other words, the only textual exclusion the provision contemplates in terms of contestable failure is an institution's *omission to adopt a recommendation or opinion*. Indeed, the procedure does not only concern failures to adopt final legal acts, the case law suggests that it may address failures to adopt preparatory acts too.[269]

There is therefore space for an interpretation according to which the Commission may be asked to take steps to enforce EU law including by way of an Article 258 TFEU course of action, to ensure that the EU meets its obligations towards third states (and their nationals). Such an openness might be even more justified in the case of neighbouring states having a special relationship with the EU, considering the terms of Article 8 TEU, and in particular if that relationship does involve the creation of elaborate individual rights, and/advanced forms of cooperation, if not degrees of integration.[270]

The *Venezuela* decision is a stepping stone for such a jurisprudential development. It may open the possibility for affected third states to invoke the failure

---

[267] See *Rosneft*, ¶75.

[268] Further : Christophe Hillion, "Conferral, cooperation and balance in the institutional framework of the EU external action" in Marise Cremona (ed.), *Structural principles in EU external relations law* (Hart, 2018), p. 117.

[269] See Jean-Paul Jacqué, *Droit institutionnel de l'Union européenne* (Dalloz, 2015), pp. 717.

[270] Note, in this sense, that the Court of Justice has also broadened the right of some specific non-EU states to submit observations to the Court in cases involving the application of EU law within the EU legal order. Thus, in Case C-328/20 *Commission v Austria*, EU:C:2020:1068, the Court acknowledged the right of the EEA EFTA states to submit observations in infringement cases based on Article 258 TFEU, in addition to preliminary ruling cases based on Article 267 TFEU.

to act procedure in case EU institutions do not themselves intervene effectively to enforce the rule of law internally, and/or for impacted third country nationals to obtain reparation. Precluding such a procedure would sit uneasily with the mandatory language of Article 17(1) TEU, understood in the light of Articles 21, 23 TEU and Article 205 TFEU, and ultimately Article 2 TEU.

Opening up to such external claims of EU answerability would add pressure on Union institutions and Member States to secure coherence between the EU external action, the objectives it shall pursue, and the principles it shall respect. In particular, it would further contribute to ensuring that the Union's external action is conducted in accordance with the rule of law, thus preserving its credibility in promoting it in its relations with the wider world, while at the same buttressing its authority to enforce it internally. Such an openness and consistency would demonstrate the maturity of the EU as constitutional order and as subject of international law. It would be the epitome of the Union's autonomy rather than a threat thereto.

## 4. CONCLUDING REMARKS

The EU constitutional charter establishes a complex mandate for the Union to safeguard the rule of law in (its relations with) the wider world. The rule of law must not only be coherently promoted and upheld as central objective of the EU external action. It must also be systematically observed in the development and implementation of the EU external action, by EU institutions and Member States alike, under the control of the European Court of Justice.

Upholding the rule of law externally *and* safeguarding it internally are intrinsically interlinked requirements for the Union authoritatively to fulfil its rule of law mandate. Without observance of the rule of both inside *and* outside, and without systematic mobilization of available enforcement mechanisms to that effect, the EU will be discredited as subject of international law advocating a "rules-based international order" on which its influence otherwise hinges, and jeopardized as a "community of law" on which its existence depends.

In the face of a fast return of the rule by force, notably in its vicinity, the Union's institutions and Member States have a fundamental interest in redoubling their efforts to help it fulfil its external rule of law mandate. This requires further elucidation and systematic application of standards internally, as well as coherence in their external promotion. Simultaneously, it entails thorough enforcement of the rule of law in the development and implementation of the EU external policies, at both institutions' and Member States' levels. This, in particular, means overcoming the tension inherent in the Treaties between the general assertion that the rule of law is a constitutional principle governing e.g., the whole of the EU external action, and the principled restrictions imposed on the judicial control over measures adopted in that context. It equally presupposes the Member States' continued compliance with the rule of law, guaranteed by systematic EU and transnational monitoring and enforcement, and if need be by third countries and their nationals. They too must have an interest in the EU living up to its mandate, and its values.